Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

RALPH OVADAL,

Petitioner,

v s .

CITY OF MADISON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves an individual (petitioner) who attempted to convey a controversial religious message via signs on a pedestrian overpass in Madison, Wisconsin. Police officers forced petitioner to put down his signs under threat of arrest pursuant to a policy that permits signs on overpasses but forbids expressive activities that may cause traffic hazards. The Seventh Circuit upheld this regulation as content neutral by accepting the district court's factual finding that the drivers reacted to petitioner's presence on the overpass and not against petitioner's message.

The following questions are presented:

1. Should appellate courts review factual findings in First Amendment cases de novo or under a clearly erroneous standard?

2. Can the government appropriately ban peaceful sign use on a public sidewalk because of adverse reaction by the audience?

PARTIES TO THE PROCEEDING

Petitioner Ralph Ovadal ("Ovadal") brought suit and was a Plaintiff-Appellant before the Seventh Circuit. Besides the respondent City of Madison, Wisconsin ("Madison"), the following are respondents and were Defendants-Appellees before the Seventh Circuit: Richard Williams, in his official capacity as Chief of Police for the City of Madison, Wisconsin, Chris Paulson, individually and in his official capacity as police officer for the City of Madison Police Department, and Patrick Grady, individually and in his official capacity as police officer for the City of Madison Police Department.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Sup. Ct. Rule 29.6, Petitioner Ralph Ovadal states that he is not a subsidiary or an affiliate of a publicly owned corporation.

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DECISIONS BELOW

The decision of the district court granting summary judgment for defendants is reprinted at Appendix ("App.") 31a. The first decision of the Seventh Circuit overturning the district court's order of summary judgment is reported as *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005) (*Ovadal* I) and is reprinted at App. 20a. The decision of the district court denying summary judgment for plaintiff and defendants is reprinted at App. 14a. The decision of the district court awarding final judgment to defendants is reported as *Ovadal v. City of Madison*, 2005 WL 3434402 (W.D. Wis. December 13, 2005) and is reprinted at App. 11a. The second decision of the Seventh Circuit affirming the district court's judgment is reported as *Ovadal v. City of Madison*, 469 F.3d 625 (7th Cir. 2006) (*Ovadal* II) and is reprinted at App. 1a. The decision of the court of appeals denying rehearing and rehearing *en banc* is reprinted at App. 49a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment in this case on November 20, 2006. The Court of Appeals denied petitioner's petition for rehearing and rehearing *en banc* on January 3, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the

> freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Madison's unwritten policy to prohibit signs, banners and demonstrations that cause a traffic hazard.

STATEMENT OF THE CASE

A. Factual Background

As a tenet of his faith, Ovadal shares his religious beliefs, including his viewpoints on the morality of homosexual behavior, in public. App. 59a-60a. A resident of Green County, Wisconsin, Ovadal travels to locations where he can reach as many people as possible with his message. *Id.* Toward this end, Ovadal seeks to use pedestrian overpasses that span the Beltline highway in the City of Madison area. App. 60a-61a. The Beltline highway is a major thoroughfare and a limited access freeway with a fifty-five (55) mile per

hour speed limit. App. 53a-54a. The unique character of the Beltline overpasses ensures that Ovadal reaches his intended audience. App. 60a-61a. Being fenced in, and above traffic, these pedestrian overpasses also give Ovadal an opportunity to present his message from a safe location. App. 60a.

As of September 2, 2003, individuals were permitted to hold signs and banners on Beltline overpasses, but Madison maintained a policy that enabled police officers to prohibit signs, banners and demonstrations on pedestrian overpasses that they thought could cause a traffic hazard. App. 54a. Madison police department does not supply any objective guidelines to their police officers for determining the existence of a "traffic hazard." App. 226a-27a. The finding of a "traffic hazard" is up to the individual discretion of a given police officer. App. 225a-27a.

On this day, September 2, 2003, Ovadal, and several colleagues, attempted to convey a religious message through the display of signs and banners on a pedestrian overpass between the Seminole Hwy exit and the Verona Road exit on the Beltline highway in the City of Madison. App. 53a-54a, 63a-64a, 296a-97a. The group displayed two banners inscribed with the phrase "Homosexuality is sin." App. 53a-54a. They also displayed two (2) signs stating "Christ can set you free" and "Repent ye and believe the Gospel." App. 63a. The lettering on the signs and banners were enlarged so as to be readable by the travelers on the Beltline. *Id.* While holding their signs, Ovadal and his group were stationary, and interaction with the travelers on the Beltline was minimal. App. 63a-64a, 165a.

At approximately 4:37 p.m., Officer Fields of the Madison police department, while driving his personal vehicle on the Beltline highway, noticed Ovadal and his colleagues on the pedestrian overpass. App. 164a-65a, 296a-

97a. Officer Fields could read the sign stating "Homosexuality is a sin" from his vantage point. App. 165a, 296a. He also noted a slow up in traffic and presumed Ovadal's signs to be the cause. App. 164a-65a, 296a-97a. Officer Fields then informed Madison police department dispatch of what he saw, and was told by dispatch that they had received calls from several people "who were very upset in reference to the protest taking place on the walkway." App. 165a-66a, 296a-97a.

Officer Fields then turned his vehicle around and approached Ovadal. App. 63a-64a, 296a-97a. Officer Fields warned: "You really can't be over here. You're obstructing traffic. We've got several calls on it. You really need to just take your protest someplace else." App. 64a-65a, 165a-67a, 248a.[1] Ovadal questioned Officer Fields as to why his protest would be a problem. To which, Officer Fields answered: "All I know is that we've gotten several calls from disgruntled people....You're causing a disturbance." App. 64a-65a, 156a, 166a-67a, 249a-50a. Drivers were reportedly disturbed by Ovadal's message. App. 64a-65a, 129a. Officer Fields then queried: "If someone were disturbing you, you would want me to do something about it, right?" App. 167a-68a, 250a. Ovadal replied that anyone who disturbs him has a right to free speech; otherwise, a restriction of that sort would be a heckler's veto. App. 64a-66a, 167a-68a, 250a. In way of a retort, Officer Fields advised: "I don't care about a heckler's veto, to tell you the truth." App. 65a-66a, 250a. Ovadal asked Officer Fields if the reason for the forced ouster was because some people complained, and Officer Fields answered: "Right." App. 65a-66a, 113a-14a, 251a.

Officer Fields asked Ovadal and his group to leave the

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[1] All of the conversations between police officers and Ovadal on September, 2, 2003 were videotaped and transcribed. App. 113a.

overpass, and Ovadal queried about whether he is being ordered to leave under the threat of arrest. App. 251a-52a. Upon considering the matter, Officer Fields contacted his supervisor, Sergeant Chris Paulson (Sgt. Paulson) and inquired about the propriety of Ovadal's expressive activity. App. 251a-53a. Sgt. Paulson decided to let Ovadal remain on the overpass as long as his group refrained from blocking pedestrian traffic and there were no serious complaints. App. 193a, 253a-54a. Accordingly, Officer Fields advised Ovadal that he could stay on the overpass as long as he left a pathway open for people. App. 253a-54a.

Subsequently, Sgt. Paulson changed his mind. App. 173a-74a, 193a-94a. In light of additional complaints about Ovadal's expression, and Officer Fields' observations at the scene, Sgt Paulson decided to remove Ovadal's signs from the pedestrian overpass. App. 193a-94a. One caller reported being "disturbed" by the signs, and others suggested that the signs were causing "near crashes." App. 194a-95a. And there was at least one call reporting individuals slamming or dynamiting their brakes in response to the signs. App. 149a-50a. Neither Sgt. Paulson, nor Officer Fields, nor anyone else affiliated with the police department followed up with any of the callers to determine what exactly they observed or experienced. App. 195a.

Officer Fields did not see any "near crashes." App. 168a-69a. Officer Fields' observations, as relied upon by Sgt. Paulson, concerned yelling from vehicles and honking of horns. App. 195a-96a. Particularly, Officer Fields observed people responding angrily to Ovadal. App. 169a-70a, 300a. He saw "several people sticking up their middle fingers up at Ovadal and his protesters." App. 169a-70a, 300a. Officer Fields noticed "one woman, while driving, actually come up through her sunroof and scream obscenities at Ovadal and his parishioners." App. 169a-70a, 300a. In sum total,

according to Officer Fields, "[s]ome people were acting irresponsibly and driving in a careless manner due to their outrage at Ovadal's signs." App. 300a.

Upon this basis, Sgt. Paulson instructed Officer Fields to go back to Ovadal and tell him to leave the overpass with his signs under the threat of arrest. App. 193a-94a. Officer Fields then returned to the pedestrian overpass, along with Officer Cummins of the same police department, and advised Ovadal that he and his group would be required to leave the area after all. App. 66a, 157a-58a, 168a, 182a, 193a-94a, 254a-55a, 300a-01a.

At approximately 5:30 p.m., pursuant to Officer Fields' instruction, Ovadal and his group were preparing to leave. App. 66a-67a. Then, Officer Fields received a radio call advising that Ovadal could remain on the bridge until Sgt. Paulson could make it to the scene. App. 158a, 180a-81a, 263a. While awaiting Sgt. Paulson's arrival, Ovadal and Officer Fields continued their conversation. Ovadal asked Officer Fields whether a labor picket could be prohibited because someone might get distracted. App. 171a-72a, 264a-65a. In response, Officer Fields said: "I'm not talking about a labor picket. I'm talking about you." App. 171a-73a, 265a. Ovadal pressed the matter further, and urged his right to express his beliefs. App. 265a-66a. Officer Cummins interjected herself, and remarked that the expression was "legal" up and until it began "harassing people or making other people feel uncomfortable." App. 268a.

At approximately 5:45 p.m., Officer Fields once again ordered Ovadal and his colleagues to leave the pedestrian overpass under threat of arrest, per Sgt. Paulson's final orders. App. 158a-59a, 183a-84a, 270a. Officer Fields told Ovadal that he could stay on the overpass if he did not

display his signs and banners. App. 173a-74a, 271a-72a.

Sgt. Paulson went to the scene and addressed Ovadal himself. App. 196a-97a. Ovadal asked Sgt. Paulson if they could just hold their signs up so that the individuals in the slow-moving lanes could see them, but this request was denied. App. 196a-97a, 276a-77a. Ovadal tried to confirm that Sgt. Paulson spoke with authority on behalf of the Madison police department and asked to speak to a captain or someone else higher in command, but this request was denied. App. 71a-72a, 196a-98a, 276a-77a. Sgt. Paulson responded: "[T]here is no captain. This is my decision." App. 277a.

Ovadal queried Sgt. Paulson extensively about whether he could display a sign at another time or under different traffic conditions. App. 69a, 174a-75a, 185a. Ovadal repeatedly asked: "When can I be on that bridge? App. 278a. Upon Sgt. Paulson refusing to answer, Ovadal pursued the request further: "Ever? Can I be on it at 4 in the morning tomorrow morning? Can I be on it at 3 in the morning? Could I be on it at noon? Can I ever be on that bridge?" App. 278a. In finally answering, Sgt. Paulson explained: "What I am saying is the venue here, no, it is not suitable for demonstration." App. 278a.

Ovadal persisted: "I can never hold a sign on that bridge ever, 24 hours a day? If I come back here at 2 in the morning, I can't hold a sign?" App. 278a. Standing firm, Sgt. Paulson declined to provide any available circumstance for Ovadal's speech. And Ovadal confirmed: "So you're saying no - - under no condition ever could we be on that bridge there? No matter how slow it is, no matter what time of day?" App. 278a. Sgt. Paulson elaborated to Ovadal that he had a right to be on the bridge but he did not have the freedom to demonstrate with signs. App. 279a-80a.

Upon being pressed further about this, Sgt. Paulson maintained: "Well, again, not on this bridge. Not with the location of this bridge. You know, can the demonstration be facilitated in a manner where I'm not worrying that someone's going to slam on their brakes because they're upset, and that now we are going to have an accident and now I'm out on the accident? I have to make a tough decision here. The reality is, do I support free speech? Absolutely. Does the Madison police department support free speech? I think we have a history of doing that." Ovadal interjected: "Up until now." Sgt. Paulson concluded: "The reality is on this particular bridge, an overpass on a belt line where the traffic is can be intense, this is my decision. The answer is no." App. 198a-99a, 280a.

Ovadal then inquired about the possibility of holding signs on other pedestrian overpasses in the City of Madison. App. 280a. Ovadal asked: "None of these overpasses in your sector - - ." App. 280a. Sgt. Paulson interrupted: "Not in the City of Madison. App. 280a. Ovadal pondered: "Do you have other ones [overpasses] like that, I mean, in yours? Because I know there are more. So none of these?" App. 280a. At this point, Sgt. Paulson answered Ovadal's question clearly: "No. No, you're not going to be up on the highway. Okay." App. 280a.

Thereafter, on October 11, 2003, Ovadal and several other individuals attempted to display the same signs and banners on another Beltline pedestrian overpass, this time, near the Park Street exit in the Town of Madison, which is a suburb of the City of Madison. App. 54a, 71a-72a, 212a.[2] Ovadal had previously displayed signs and banners at this location and believed it to be outside of the jurisdiction of the City of Madison. App. 71a-72a.

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[2] This conversation was videotaped and transcribed as well.

After a short period of time, Sergeant Patrick Grady of the City of Madison police department (Sgt. Grady) approached Ovadal and told him that he and his group would not be allowed to express their message through signs on the pedestrian overpass. App. 72a-73a, 113a-14a, 208a-9a, 212a, 285a.[3] Elaborating on this position, Sgt. Grady offered: "And I guess my feeling is that you present a traffic hazard there. You've got people going 60, 70 miles an hour down there and they're looking up there and seeing you." App. 54a, 214a-15a, 285a. Sgt. Grady threatened Ovadal with citation and arrest if he did not take down his signs and banners and leave the overpass. App. 73a-74a, 209a-10a, 288a.

Ovadal asked whether the City of Madison had jurisdiction over the overpass since it was in the Town of Madison, and Sgt. Grady informed Ovadal that the overpass was actually in the City of Madison's jurisdiction. App. 73a-74a, 208a, 286a-87a. Ovadal asked: "Okay. But, tell us what - - this is under your jurisdiction?" App. 287a. Sgt. Grady confirmed: "That's what I understand." App 287a. So, Ovadal wondered: "Well, tell us what the situation is. You're saying we have to leave?" And Sgt. Grady replied: "Yeah." App. 287a. Ovadal queried further: "It's the same situation? We'd be cited?" App. 287a. Sgt Grady agreed: "Same. - - Cited. - - Yep. You know, I understand, you know, and I support your right to protest. You know, that's fine. And Greenway Cross was okay. I mean, we didn't have a problem with that, but with the overpass, we do have a problem." App. 287a. Having a reasonable belief that they would be arrested if they did not comply with Sgt. Grady's instructions, Ovadal and his group left the area. App. 54a.

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[3] Sgt. Grady and Sgt. Paulson were sergeants in the same district in 2003. App. 201a-02a. Sgt. Grady heard about Ovadal and Sgt. Paulson instructed Sgt. Grady on how he handled the situation. App. 202a-03a.

While Ovadal's speech through signs has been stymied, many other individuals and groups have been free to display signs and banners on Beltline overpasses during the same time frame. App. 203a-04a. On November 2, 2004, a group of demonstrators held Kerry-Edwards signs on the Fish Hatchery Road overpass, an overpass on the Beltline highway in the City of Madison. App. 116a. The demonstration involved many people, and many signs, directing their campaign message toward individuals traveling on the Beltline, but the Kerry-Edwards supporters were not required to leave the overpass by the Madison police. App. 116a-18a, 135a. Also, on September 3, 2005, an anti-war protestor was observed holding a sign on a Beltline pedestrian overpass, adjacent to Exits 261 A and B in the City of Madison, in an attempt to communicate to the travelers below. App. 293a-94a, 314a. The protestor was demonstrating against the Iraq war by holding a sign against the fence so drivers could read his message. App. 293a-94a, 314a. In addition, Sgt. Paulson has seen various signs and banners conveying support for high school sports teams participating in state high school tournaments, words to the effect of "Go Team." App. 203a-04a. Other than Ovadal, no one has ever been restricted from holding a sign on a pedestrian overpass in Madison. App. 203a-04a.

B. Proceedings Below

To vindicate his right to speak, Ovadal filed his Verified Complaint for Declaratory and Injunctive Relief and Damages on May 25, 2004, along with a Motion for Preliminary Injunction. The district court denied Ovadal's Motion for Preliminary Injunction by Order dated July 15, 2004. After discovery, the parties filed cross-motions for summary judgment, Madison on September 1, 2004, and Ovadal on September 23, 2004. On November 8, 2004, the

district court entered an Order and Judgment denying Ovadal's Motion for Summary Judgment and granting Madison's Motion for Summary Judgment, dismissing all claims brought by Ovadal. App. 31a. Following this decision, Ovadal filed his first Notice of Appeal to the Seventh Circuit Court of Appeals on November 22, 2004.

On July 19, 2005, the Seventh Circuit issued its opinion reversing the district court's order of summary judgment and remanded the case for further proceedings in the district court. App. 20a. The Order on remand was received by the district court on August 19, 2005. App. 14a.

The district court held a bench trial on December 12, 2005. App. 51a. Following the trial, on December 13, 2005, the lower court issued a Memorandum and Order entering Judgment in favor of Madison and against Ovadal. App. 11a. On December 23, 2005, Ovadal filed his Notice of Appeal. On November 20, 2006, the Seventh Circuit issued its opinion affirming the district court's judgment in favor of Madison and against Ovadal. App. 1a. Then, on December 15, 2006, petitioner filed a Petition for Rehearing and a Petition for Rehearing En Banc. On January 3, 2007, both petitions were denied. App 49a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARD OF REVIEW APPLICABLE TO FACTUAL FINDINGS IN FIRST AMENDMENT CASES

Though appellate courts generally defer to trial courts over factual issues (Fed. R. Civ. P. 52 (a)), the First Amendment triggers a heightened standard of review and requires an "independent examination" of the whole record.

See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 567 (1995) ("[O]ur review of petitioners' claim that their activity is indeed in the nature of protected speech carries with it a constitutional duty to conduct an independent examination of the record as a whole, without deference to the trial court."); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) ("In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full."); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508 n.27 (1984) ("The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's de novo review.").

As this Court explained in *Bose*, independent review is necessary for the protection of First Amendment freedoms that arise in fact-intensive contexts. *Bose*, 466 U.S. at 501-03. Despite the apparent clarity of this point, appellate courts have applied the independent review rule in various and inconsistent ways. Some circuits apply de novo review to all factual findings, with the exception of credibility assessments. *E.g., Newton v. National Broadcasting Co.*, 930 F.2d 662, 671 (9th Cir. 1990). Other circuits deferentially review all facts and factual inferences. *E.g., Locurto v. Giuliani*, 447 F.3d 159, 177 (2nd Cir. 2006). This remarkable difference in holdings reveals confusion among appellate courts about the standard of review applicable to factual findings in First Amendment cases. As one scholar summarized: "No one seems to dispute that the independent judgment rule, where it applies, at least requires that the conclusion drawn from the record be made independently and thus without deference. The debatable question is how far down the factual ladder the review extends." Steven Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1326 (1996).

Various scholars have noted this confusion and the need to explain the application of *Bose. See, e.g.*, Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 629 (2004); Rodney A. Smolla, 2 Law of Defamation, Vol. 2, § 12.86, p. 12-75 (West Pub. 2d Ed. 2004); Robert D. Sack, Sack on Defamation: Libel, Slander and Related Problems, Vol. 1, § 1.11, p. 1-47 (3rd Ed. 2002); Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 Duke L.J. 1427, 1441-45 (2001); L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review For First Amendment Free Speech Cases*, 31 CREIGHTON L. REV. 387, 398-401 (1998); Childress, *supra*, at 1277-78; Tigran W. Eldred, *Amplifying Bose Corp. v. Consumers Union: The Proper Scope of De Novo Appellate Review in Public Defamation Cases*, 57 Fordham L. Rev. 579, 581-83 (1989). Courts have also noted this confusion and the existence of a circuit split. *E.g. Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 & n.27 (11th Cir. 1999).

A. This Case Presents an Ideal Vehicle to Clarify the Standard of Review

In *Ovadal* II, the Seventh Circuit applied deferential review to factual findings dispositive of the First Amendment claim. According to the *Ovadal* II court, the constitutionality of Ovadal's actions turned on whether the audience reacted to his message or to his "presence." 469 F.3d at 630. Despite the exceptional importance of this issue, the *Ovadal* II panel reviewed it deferentially:

> The [district] court entered findings of fact that on the two dates in question the traffic safety problems were not caused by the

> content of the message on the signs that the protesters carried. Thus, the [district] court concluded, Madison's decision to move the protesters from the bridge was not the result of the content of the speech. The evidence and testimony could certainly have supported such a finding of fact...Because the district court's findings of fact are not clearly erroneous, we will not disturb them.

Id. (citation omitted). This factual finding was not rooted in credibility assessment, but was inferred from various sources of evidence.[4] Nevertheless, the panel still deferred to the lower court on this crucial issue.[5]

This deference dictated the outcome of the case. If the Seventh Circuit had applied de novo review, in lieu of the clearly erroneous standard, the appellate court would have discerned that the restriction was tied to Ovadal's expression. The evidence demonstrates that the restriction was premised on content, prompting a ruling in Ovadal's favor. Thus, in this very real sense, the result of the case turned on standard of review.[6] Because the standard of review was so significant in this case, and because the Seventh Circuit so obviously deferred to the lower court on a "constitutional" fact, this case provides a proper means for resolving the confusion.

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[4] No drivers testified to explain their reasons for reacting to Ovadal. Rather, the drivers' intent was inferred from police reports and descriptions of the drivers' behavior.

[5] This deference was given, although Madison likewise advised the appellate court that the proper standard of review is de novo. (Appellees' Brief at pp. 24-25).

[6] As discussed *infra*, the appellate court improperly allowed Ovadal's speech to be dictated by the reaction of the audience. Nevertheless, the Seventh Circuit's failure to apply de novo review led to the erroneous decision.

B. Circuit Courts Disagree over the Standard of Review

Appellate courts are split over the appropriate method of reviewing factual findings in First Amendment cases. Because the circuits apply a different standard of review to the same factual finding, there is incongruity among the appellate courts, which has led to inconsistent rulings.

1. Some circuits apply de novo standard

In the aftermath of *Bose*, *Harte-Hanks*, and *Hurley*, some circuits give deference to credibility assessments, but independently review all other factual findings in First Amendment cases. For example, the Third Circuit consistently applies de novo review to factual findings in First Amendment cases. *See, e.g., Christ's Bride Ministries, Inc. v. Southeastern Pennsylvania Transp. Authority*, 148 F.3d 242, 247 (3rd Cir. 1998) ("This independent duty ... require[s] us [to] draw our own inferences from the factual evidence presented"); *Fabulous Associates, Inc. v. Pennsylvania Public Utility Com'n*, 896 F.2d 780, 783 (3rd Cir. 1990) ("We note that in the area of constitutional fact, we are not required to defer to factual inferences reached by the district court.").

Under this approach, factual findings receive de novo review if the facts affect First Amendment rights. This includes factually-integral issues such as intent.

> The question of whether the Commissioner was motivated by religious animus turns on subjective intent. Normally, the determination of a party's "actual motive" is the type of mixed question of law and fact which we review for clear error. However,

> when questions of motive implicate constitutional rights, we review de novo.

Church of Scientology of Cal. v. C.I.R., 823 F.2d 1310, 1320 (9th Cir. 1987) (citations omitted).

Therefore, such circuits reject the analysis set out in *Ovadal* II and apply de novo review to dispositive factual findings. The Eighth Circuit exemplified this approach when it distinguished critical facts (facts crucial to the constitutional claim) and noncritical facts (facts irrelevant to the constitutional claim). According to that appellate court, critical facts and the evidentiary basis for critical facts receive independent review with no deference. *Families Achieving Independence and Respect v. Nebraska Dept. of Social Services*, 111 F.3d 1408, 1411 (8th Cir. 1997). The Eighth Circuit, like the Third, and the Ninth, review issues of fact, and not just mixed questions of law and fact, de novo. This approach complies with this Court's precedent, reviewing all constitutionally-related facts de novo, except for pure credibility evaluations.

This particular approach is perhaps best articulated by the Ninth Circuit in *Newton, supra*:

> [A]lthough we generally review all purely factual findings for clear error, ...when we review evidence on the dispositive constitutional issue of actual malice, we are required to be more discriminating in our deference. The presumption of correctness carries its maximum force when we review findings of fact that turn on credibility determinations because of the factfinder's unique opportunity to observe the demeanor of the witnesses. On the other hand, the

> presumption applies with less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences. ...[E]ven when we accord credibility determinations the special deference to which they are entitled, we must nevertheless examine for ourselves the factual record in full. In sum, we read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the . . . rule of independent review.

930 F.2d at 670-71 (citations and quotation marks omitted). This method conflicts sharply, though, with the deferential approach used by some other circuits.

2. Some circuits apply clearly erroneous standard

Some other circuits, most notably the First, Second and Seventh, conduct deferential review of all factual findings in First Amendment cases. On this theory, de novo review is limited solely to mixed questions of law and fact:

> [T]he reviewing court does not extend the independent review standard to all determinations concerning a particular legal claim, but only to those that specifically involve the application of First Amendment law to specific facts. Purely factual determinations, particularly those involving the credibility of witnesses, remain best addressed by the factfinder, and are subject to the usual, more deferential standard of review.

Veilleux v. National Broadcasting Co., 206 F.3d 92, 107 (1st Cir. 2000) (citations omitted). With *Ovadal* II, the Seventh Circuit also decided to give deference to all factual findings. Indeed, *Ovadal* II accepted a dispositive and constitutional "finding of fact" with blind deference. 469 F.3d at 630. In effect, this approach interprets *Bose* narrowly and limits de novo review to only mixed questions of law and fact.

This limited interpretation of *Bose* also manifests itself in retaliatory discharge claims under the First Amendment. Even though First Amendment values turn on employer intent in these cases, a handful of circuits (First, Second, and Seventh) still review factual basis of such intent for clear error. "[T]he defendants' intent is a factual question, which we review for clear error...." *Locurto*, 447 F.3d at 177 n. 6. *Accord Gustafson v. Jones*, 290 F.3d 895, 906 (7th Cir. 2002); *Duffy v. Sarault*, 892 F.2d 139, 145 (1st Cir. 1989) (reviewing employer's intent for clear error because findings were "made from documentary and testimonial evidence, both of which are best judged by a trier of fact...."). Thus, the treatment of retaliatory discharge claims by these courts, akin to *Ovadal* II, reflects a reading of *Bose* that ignores its import. On this theory, facts never receive independent review, even if dispositive to the First Amendment claim. Only the application of facts to a legal standard is reviewed de novo in said circuits.

C. All Circuits Ought to Apply De Novo Standard to Factual Findings -- Except for Credibility Assessments -- in First Amendment Cases

Precedent demands de novo review of all factual findings, except for credibility assessments, as vividly demonstrated in *Bose* itself. In *Bose*, this Court applied de novo review to actual malice---a factual finding regarding a

subjective state of mind determination. Thus, if *Bose* means anything, it means that factual findings (such as intent) must receive de novo review, particularly if dispositive for First Amendment claims. As one scholar observed:

> At the very least, *Bose* must be found to apply to factual inferences from the record, drawn as they may be from foundational facts, and not just pure conclusions of law. The process of decisionmaking actually used by *Bose* and most independent judgment cases clearly encompasses freely drawing factual inferences from other facts, which in normal contexts is prohibited....

Childress, *supra,* at 1327.

Logic likewise supports this interpretation of *Bose*, for at least three reasons. First, First Amendment values require alterations to the normal fact-finding process so as to prevent a chilling effect on speech. As this Court remarked, de novo approach is justified by the social importance of First Amendment freedoms. *Bose*, 466 U.S. at 503-04.

Second, some constitutional issues are so bound up with facts that courts must necessarily review the facts de novo to conduct any sort of independent review:

> [Sometimes] the factual inference drawn depended so heavily on some foundation fact, that the Court can only have second-guessed the resulting inference by doing the same as to one or more basic or historical facts. In *Bose* itself, for instance, the Court fundamentally performs nondeferential review as to the question of whether a witness

> believed what he wrote and knew it at the time, which can only be fairly described as something close to the foundational fact behind actual malice and not just the conclusion on malice as such.

Childress, *supra*, at 1277-78. *See Bose*, 466 U.S. at 503.

Third, appellate courts can easily evaluate many facts from the record. "When historical facts are anchored in documentary evidence, take the form of uncontroverted testimony or are buttressed by other non-testimonial evidence in the record, the appellate court's adjudicatory competence is substantially increased." Eldred, *supra*, at 589. While appellate courts may have some difficulty in assessing credibility, appellate courts can undoubtedly make factual inferences from the record. *Harte-Hanks*, 491 U.S. at 689 n. 35. Therefore, precedent and logic confirm the need to review "constitutional" facts de novo, and not under a clearly erroneous standard. Circuits that reject this conclusion stand in need of this Court's correction.

II. THIS COURT SHOULD GRANT REVIEW TO PROHIBIT REGULATIONS ON SPEECH THAT TURN SOLELY ON LISTENER REACTION

This case concerns the extent to which the government may rely on listener reaction to regulate speech. An oft-cited principle, regulations on speech may not turn on listener reaction. *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *Boos v. Barry*, 485 U.S. 312, 335 (1988). *See also* Elena Kagan, *Private Speech, Public Purpose: The Role of Government Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 461-64 (1996); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 237-38 (1983).

This principle arises in the rule against heckler's vetoes. A heckler's veto typically occurs when an audience is offended by the content of a speaker's message, and the government silences the speaker in order to calm the audience. Regrettably, some appellate courts have mistaken this common scenario (hostility to speaker's message) for the principle condemning the scenario (prohibition against regulations based on listener reaction). This case reveals the error by presenting a somewhat novel question: may the government silence a speaker to calm listeners who may be reacting for reasons other than hostility toward the message. In other words, this case asks if it is ever appropriate for free speech to turn on the subjective intent of listeners reacting to the speaker. Petitioner asserts that such intent is, and always should be, irrelevant.

A. Seventh Circuit Upheld Regulation Based on Listener Reaction By Requiring Speaker to Prove Listener Hostility toward the Message

The Seventh Circuit allowed Madison to silence Ovadal in an effort to control drivers reacting to him. *Ovadal II,* 469 F.3d at 630. According to the Seventh Circuit, this regulation was justified because drivers supposedly reacted to Ovadal's presence instead of his message:

> In the end, the district court faced two possible factual scenarios. By one view of the evidence, Ovadal's message angered drivers who then reacted and were distracted from the task of driving safely, resulting in a dangerous situation that Madison needed to address. By another view of the evidence, Ovadal's presence on that day and under those driving conditions created a "spectacle" that led some

> drivers to be distracted from the task of safely navigating the Beltline and their distraction led to an escalating situation of near-accidents and anger at the traffic congestion.

Id. at 630 (underline added). The Seventh Circuit accepted the latter view of the facts and upheld Madison's regulation. *Id.*[7] On this strained logic, a regulation based on listener reaction is improper only if listeners object to the content of the speaker's message alone. Thus, the instant case allows this Court to squarely confront the legal significance of listener intent.

B. Appellate Courts Disagree on the Propriety of Speech Regulations Based on Listener Reaction

Some circuit courts steadfastly prohibit any regulation that turns on listener reaction. *See, e.g., Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (defining heckler's veto as "an attempt by those who dislike a speaker to create such a disturbance that the speaker must be silenced."). But other circuits seemingly agree with the Seventh Circuit and allow regulations that turn on listener reaction. *See, e.g., Frye v. Kansas City Missouri Police Dept.*, 375 F.3d 785, 791 (8th Cir. 2004) (upheld regulation because government purportedly acted in content-neutral manner, that is, police did not intend to suppress picketers' message but intended to mitigate traffic hazard caused by picketers).

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[7] In compounding the error, the appellate court surmised that the district court only had "two possible factual scenarios," disruption caused by message, or disruption caused by presence, without accounting for the third and most likely scenario, a combination of both. As so postured, Ovadal was forced to prove message alone as cause of all disruptions.

The Fifth Circuit embraced such a view when it upheld a statute allowing property owners to force the removal of flags placed on public property adjacent to the owner's property. *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 324 (5th Cir. 2005). There, the Fifth Circuit allowed permit regulations to be premised on listener's reaction:

> While it is true that (at least absent a clear and present danger) the government cannot restrict speech out of a concern for the discomfort it might elicit in listeners, the central concern of the "heckler's veto" cases does not arise here. In the aforementioned cases, the purpose of the content-based restriction on speech was to protect listeners from a heterodox message. In the instant case, on the other hand, the flag rule is plainly not aimed at protecting property owners or the public at large from unpopular speech.... Further, an adjoining property owner may withhold consent to a given "flag" for reasons wholly unrelated to the content or viewpoint expressed by any "message" on it.

Id. at 326 (citations omitted). Thus, within the past three years, several circuits (Fifth, Seventh, and Eighth) have upheld regulations on speech that depend on listener reaction, breaking with established precedent of this Court.

C. This Court Has Never Required Proof of Listener Hostility toward a Speaker's Message to Invalidate Regulation Based on Listener Reaction

In contrast with the trendy notion among certain circuit

courts, this Court has always invalidated regulations that turn on listener reaction. "The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 134-35 (citation omitted). No doubt, listeners often object to the content of a speaker's message. But this common scenario has never been construed to limit the principle against listener reaction.

To the contrary, this Court has denounced regulations based on listener reaction even when listeners react to speakers for reasons unrelated to content. "[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) (citation and quotation marks omitted; underline added). As this language makes clear, the government may not suppress speech because listeners object to either the message or the mere existence of the speaker. The government may never rely on listener reaction—whether motivated by content or not---to suppress a speaker. *See, e.g., Cohen v. California*, 403 U.S. 15, 21 (1971) (finding that audience's objection to "Cohen's distasteful *mode* of expression" was insufficient justification for government to regulate speech) (emphasis added); *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring) ("Such language could authorize conviction simply because the *form* of the protest displeased some of the onlookers, and of course a conviction on that ground would encroach on First Amendment rights.") (emphasis added); *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their

critics might react with disorder or violence."); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)) ("[C]onstitutional rights may not be denied simply because of hostility *to their assertion or exercise*") (emphasis added); *Wright v. Georgia*, 373 U.S. 284, 292 (1963) ("And the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present.").

This long-standing principle was reaffirmed by this Court in *Reno v. ACLU*. 521 U.S. 844 (1997). In *Reno*, a federal statute prohibited the spread of indecent messages over the internet to persons known to be under eighteen. *Id.* According to the government, the statute's intent requirement solved any constitutional problem because it permitted adults to communicate indecent material to other adults. This Court, however, rejected the argument because the statute empowered audiences to silence speakers:

> Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child...would be present.

Id. at 880. This Court feared the situation where any person could enter a chatroom, announce the presence of a minor, and thereby prevent other speakers from communicating. *Reno* stands for the principle that government may not rely on listener reaction to prohibit a speaker from speaking in an otherwise permissible forum. *See Frye*, 375 F.3d at 793 (Beam, J., dissenting) (citing *Reno* for principle that "the

protection against hecklers' vetoes even forbids statutory schemes that would allow a disapproving citizen to silence a disagreeable speaker by complaining on other, apparently neutral, grounds.").

D. Regulations that Turn on Listener Reaction are Always Improper because such Regulations Delegate Authority to Private Parties

Regulations on speech should never turn on listener reaction because a speaker's rights should not rest on the preferences of a mob. An audience can react to a given speaker for all types of reasons, including a speaker's location, methods, or timing. For example, a racist crowd could object to the presence of an African-American speaker, regardless of the content of the message. Or, an audience could object to the presence of a speaker in a public park on the theory that parks should be used for relaxing and not for speeches. A driver could be distracted by pedestrians walking down the street with messages on their shirts. Regardless, these motivations cannot justify the suppression of First Amendment freedoms.

It is highly improper for the government to delegate the power to prohibit speech to a private audience, irrespective of how the audience uses this power. When the government silences a speaker because of audience reaction, the government essentially legitimates and empowers the audience with state resources. As a result, the delegation creates a censor with all the powers of government but none of the limitations. *See Cohen*, 403 U.S. at 21 (noting that regulation based on listener reaction improper because it "would effectively empower a majority to silence dissidents simply as a matter of personal predilections.").

While various substantive and institutional checks limit the government, none of these limitations bind private mobs. For this reason, as this Court has recognized, the very act of government delegation to a private party is invalid in the First Amendment context: "While we have in prior cases found governmental grants of power to private actors constitutionally problematic, those cases are distinguishable. In those cases, the regulations allowed a single, private actor to unilaterally silence a speaker even as to willing listeners." *Hill v. Colorado*, 530 U.S. 703, 735 n.43 (2000). This anti-delegation rationale applies without regard to listener intent. The government may not delegate its power even if the mob acts appropriately in a few instances. Without any limitations on the discretion of a private audience, the potential for abuse is so great that government delegation to a private party is improper *per se*.

In any event, the additional demand for proof of audience's intent is conceptually and practically impossible. A disruptive mob cannot be expected to be forthcoming in supplying the basis for its reaction against a speaker, especially if speech can be squelched by offering an alternative basis. Even if the truth be coaxed, different members of an audience can react for different reasons, and some members of audience can react for multiple reasons.

E. Regulations that Turn on Listener Reaction are Always Improper because such Regulations Allow for Unbridled Discretion

Unbridled discretion is always improper because the mere existence of unbridled discretion allows officials to hide viewpoint discrimination behind vague language. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-78 (1988). A vague law is improper even if not enforced because that law permits viewpoint discrimination in the

future. *Id.* *See Forsyth County*, 505 U.S. at 133 n. 10 (existence of unbridled discretion depends "not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything...preventing him from doing so."). Courts assume that officials will act in bad faith when they have unfettered discretion to regulate speech. *Lakewood*, 486 U.S. at 770.

Likewise, the delegation of power to private audiences creates a chilling effect because speakers will not know beforehand why or if a private audience will react. Therefore, the mere delegation of authority to a private audience will intimidate speakers to alter their presentation in such a way so as not to disturb listeners. *See* Kagan, *supra*, at 463-64 (acknowledging impropriety of delegation because "laws turning on communicative impact (much like laws establishing standardless licensing schemes), though content neutral on their face, allow content-based actions in application, whether by enforcement officials or the public.").

Ironically, under the scheme upheld in *Ovadal II*, the government does not eliminate all speech, just effective speech. *See* Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1165 n.62, 1170-71 (2003) (arguing that speaker should not be suppressed like "attractive nuisance" because of speaker's "attractiveness" or "popularity" since such restriction regulates "on the ground that the speech operates as it is supposed to, as it is intended to--where it is exactly this aspect of its intentional operation that we are committed to protecting."). For this, and other reasons, the *Ovadal* II scheme falls squarely on the shoulders of speakers with controversial and minority opinions. Speakers with popular messages do not stir the pot with audiences as much as speakers with controversial views. In this sense, an "anti-distraction" rule effectively undermines

the impact of minority opinions and "would lead to standardization of ideas" by inhibiting the ability of such speakers to communicate their message. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). The notion is untenable. Courts should incentivize audiences to tolerate "distracting" speakers and to obey the law rather than incentivize speakers to pander to audiences' shortcomings. "[T]he burden normally falls upon the viewer to avoid further bombardment of (his) sensibilities simply by averting (his) eyes." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210-11 (1975) (citation and quotation marks omitted).

Hence, this Court has historically solved the "hostile audience" problem by regulating the audience, not the speaker. *See, e.g., Schneider v. State (Town of Irvington)*, 308 U.S. 147, 162 (1939) (invalidating ban on leafleting intended to stop littering because government should punish litterers and not leafletters). *Schneider* stands for the simple proposition that the government must regulate the wrongdoer – not the speaker – to control the negative effects of speech. This sound principle was recently affirmed:

> The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it....But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

Bartnicki v. Vopper, 532 U.S. 514, 529-30 (2001).

It is "quite remarkable" indeed. Both reason and precedent prohibit regulations on speech that turn solely on listener reaction. The ability to speak in a public forum

should not stand or fall on the whims of an unpredictable audience.

CONCLUSION

For the forgoing reasons, this Court should grant the petition and reverse the judgment of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Seventh Circuit.
Ralph OVADAL, Plaintiff-Appellant,
v.
CITY OF MADISON, WISCONSIN, Richard Williams, Chris Paulson, and Patrick Grady,
Defendants-Appellees.
No. 05-4723.

Argued Sept. 22, 2006.
Decided Nov. 20, 2006.
Rehearing En Banc Denied Jan. 3, 2007.

Before EASTERBROOK, KANNE, and SYKES, Circuit Judges.

***627** KANNE, Circuit Judge.

The plaintiff sued the City of Madison and various officers of the Madison Police Department (collectively "Madison") under 42 U.S.C. § 1983 alleging that his constitutional rights of free speech and freedom of religion were infringed. The district court granted summary judgment to Madison in a Memorandum and Order dated November 8, 2004. We remanded so that the district court could develop some aspects of the factual record. *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir.2005). After a bench trial, the district court entered judgment in favor of the defendants. *Ovadal v. City of Madison*, 2005 WL 3434402 (W.D.Wis. Dec.13, 2005). The plaintiff appeals. We affirm.

I. HISTORY

Mr. Ovadal began this, his most recent foray into the federal courts, after events that occurred in Madison in the Fall of

2003. On September 3 and October 11 of that year he organized two small demonstrations to express his opposition to homosexuality. His chosen fora for these demonstrations were overpasses where city sidewalks crossed the Madison Beltline freeway.[1] On both occasions the demonstrations had a noticeable effect on traffic below. On both occasions the Madison police arrived and forced Ovadal to move from the overpasses on the grounds that his activities were causing a traffic hazard for the motorists below him. Ovadal brought suit seeking damages as well as declaratory and injunctive relief.

As we previously held in this case, Ovadal's demonstrations are well within the core of the types of speech and acts that are protected by the First Amendment and his chosen location is a traditional public forum. *Ovadal*, 416 F.3d at 536. Madison can make time, place, or manner restrictions on such speech only if they are content-neutral, narrowly-tailored to serve a significant government interest, and leave open ample alternative means of communication. *Id.* Alternatively, Madison can make content-based restrictions on such speech only if necessary to accomplish a compelling interest and narrowly tailored to that end. *Id.* The primary issue of contention between the parties on remand and on this appeal has been whether Madison's actions were content-neutral.

Ovadal argues that a policy that restricts speech based on its effect on traffic is not content-neutral. Arguing backwards, he reasons that traffic congestion and motorist complaints are a function of motorists' reactions to his message, and that motorists will react to create a traffic hazard when confronted with a message that they do not accept. This, in

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[1] The Beltline is a restricted access freeway. In the area where Ovadal was protesting, the average speed of the traffic exceeds 60 miles per hour, with some traffic traveling as fast as 85 miles per hour.

Ovadal's view, gives the motorists a "heckler's veto" over his protected speech. *See, e.g., Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

Madison, however, contends that the decisions to remove Ovadal from the overpasses were not, even indirectly, driven by the content of his speech. The defendants contend that the police responded to a traffic hazard that was caused not by the content of Ovadal's signs but by the fact that he was creating a "spectacle" over heavy high-speed traffic. Madison argues that regardless of whether the first person who looked up at the band of protesters and tapped their brakes agreed with Ovadal's message or abhorred it, that person ***628** set off a chain reaction: traffic became increasingly more dangerous and many drivers were left angry.

The district court conducted a bench trial to resolve this factual dispute and entered judgment in favor of Madison. The court specifically entered findings of fact that the traffic congestion was not caused by (or a derivative of) the content of Ovadal's speech, but rather was caused by the presence of the band of protesters and motorists' reactions to their presence. *Ovadal*, 2005 WL 3434402, at *1-2 (W.D.Wis. Dec.13, 2005). The court entered conclusions of law that Madison's actions were content-neutral, were necessary to serve the compelling government interest of motorist safety, and left ample alternatives to Ovadal. *Id.* at *2-3.

Seven days after the bench trial, Madison Ordinance 05-00193 took effect, and amended the compiled Madison City Ordinances to prohibit any person to "display, place, erect, post, maintain, install, affix, or carry any street graphic, including a hand-carried sign" on highway overpasses such as those at issue in this lawsuit. Madison City Ord. §

31.04(6)(m). The ordinance bans any such display, provided that it is visible from the highway. *Id.* The ban is limited to freeways and expressways, or controlled access highways with a speed limit greater than forty miles per hour. *Id.*

On appeal, Ovadal seeks to have "Madison's traffic hazard policy" declared unconstitutional and enjoined from enforcement, and seeks damages for the two occasions that he was forced off the bridges. He alleges that there is either an unwritten policy that is directed at him--a "no-Ovadals-on-overpasses rule"--or alternatively that there is a policy that leaves the existence of a traffic hazard to the judgment of a police officer. This policy, he argues, gives too much discretion to the police, is incapable of content-neutral application, is not narrowly tailored, and does not serve a compelling state interest.

II. ANALYSIS

A. Declaratory and Injunctive Relief

The Constitution gives the federal courts jurisdiction over "cases" and "controversies." U.S. Const. Art. III § 2, cl. 1. When circumstances change during litigation such that there is no longer any case or controversy, the case is moot. *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). If a defendant voluntarily ceases the behavior that is complained of, the case can be rendered moot "if subsequent events [make] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quoting *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968)).

At its heart, Ovadal's request for declaratory and injunctive relief relies on the claim that Madison had an unwritten policy that impermissibly burdened his First Amendment rights by prohibiting protests when, in the opinion of a police officer, the protests were causing a traffic hazard. He bases this belief on the fact that on the two occasions when he was forced to leave the pedestrian overpasses, the officers told him that he was being forced to move because he was causing a traffic hazard. His constitutional complaint is that this unwritten policy leaves far too much to the discretion of the police officer. He notes that what might seem to be a traffic hazard to one officer might not be for another. He also argues that by restricting speech on the basis of the observable ***629** effect on motorists, the motorists might be given a heckler's veto.

As we previously noted, "[i]f [Madison] had a policy that prohibited not just Ovadal's, but all protests and all signs on all Beltline overpasses" the restriction would be "clearly content-neutral." *Ovadal*, 416 F.3d at 536. By passing § 31.04(6)(m), the city appears to have taken our previous decision to heart. The ordinance itself is not before the court: the only significance of the ordinance is the effect that it has on any alleged unwritten policy. If the ordinance now replaces the behavior that is the subject of the complaint, making the alleged unconstitutional behavior effectively impossible, the request for forward-looking relief is moot. To put a finer edge on it: the only way that the request for declaratory or injunctive relief would not be rendered moot by the ordinance would be if Ovadal could point to some subset of expressive behavior that is currently allowed by the ordinance but would be banned by the alleged traffic hazard policy.

The parties agreed at oral argument that the behavior that started this lawsuit--carrying signs over the Beltline freeway-

-is now strictly banned regardless of the time of day, the effect on the motorists below, or the noticeable effects on traffic safety. At oral argument, Ovadal claimed that the ordinance does not ban non-sign protests, nor does it ban motorist-distracting signs from bridges over other, slower speed, roads in Madison. Ovadal posits that these two activities, which are not prohibited by the ordinance but would be subject to the alleged traffic hazard policy, show that the case or controversy is still alive. But those types of activities are not before the court in this appeal. There has been no showing that Madison has ever prevented or would prevent Ovadal from marching without signs over any sidewalk or bridge in Madison. Likewise, there is no evidence that Ovadal has ever been asked to move when demonstrating from a bridge over a slow-speed roadway. Such restrictions, if they existed, would raise significant constitutional questions. But we are now three years into this litigation and the evidence, the district court's decision, and the briefs and arguments made here on appeal have not been directed at those questions or those types of behavior. If there are such instances, they are issues for a different lawsuit. It would be an advisory opinion in its worst form to use this forum to rule on the constitutionality of an alleged unwritten policy that might be used to prevent behavior that has never been the subject of the litigation at hand. Therefore, with respect to any unwritten traffic hazard policy, the request for declaratory and injunctive relief has been rendered moot by the passage of the ordinance.

B. Damages

However, the passage of the ordinance is not dispositive of the request for damages for any constitutional violation that might have been suffered in the past. The case comes to us on appeal after a bench trial: we defer to the district court's findings of facts unless clearly erroneous, and will review

questions of law de novo. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 551 (7th Cir.2005). There are two questions before us: whether Madison violated Ovadal's constitutional rights on the two occasions in the Fall of 2003 when he was forced off the overpasses, and whether Madison violated his constitutional rights by effectively banning him from other similar protests through an alleged unwritten policy.

With respect to the two discrete incidents in September and October, the district court heard the testimony of eight ***630** witnesses and received sixteen exhibits. Without recounting the entirety of the evidence, we can summarize it as follows: Ovadal and his long-time companion Mike Foht testified that they did not see any noticeable effect on traffic, but several police officers--including a deputy sheriff who is not a defendant in the present suit--testified that traffic was impeded and dangerous. There was conflicting testimony about whether the accidents and reported near-accidents were the result of general curiosity about the activities of the protesters or whether the accidents were being caused by drivers' reactions to the message that Ovadal and Foht were displaying about homosexuality. The court received evidence about the number of calls placed to 911 regarding the traffic, and the nature of the complaints that those callers made.

In the end, the district court faced two possible factual scenarios. By one view of the evidence, Ovadal's message angered drivers who then reacted and were distracted from the task of driving safely, resulting in a dangerous situation that Madison needed to address. By another view of the evidence, Ovadal's presence on that day and under those driving conditions created a "spectacle" that led some drivers to be distracted from the task of safely navigating the Beltline and their distraction led to an escalating situation of

near-accidents and anger at the traffic congestion. As we noted on remand, if the findings of fact supported the first view, then the drivers were simply rabble, fuming at the content of Ovadal's rabble-rousing speech, and "[t]he police must permit the speech and control the crowd; there is no heckler's veto." *Ovadal*, 416 F.3d at 537 (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir.1993)).

The court entered findings of fact that on the two dates in question the traffic safety problems were not caused by the content of the message on the signs that the protesters carried. *Ovadal*, 2005 WL 3434402, at *1-2 (W.D.Wis. Dec.13, 2005). Thus, the court concluded, Madison's decision to move the protesters from the bridge was not the result of the content of the speech. The evidence and testimony could certainly have supported such a finding of fact. "In weighing direct and circumstantial evidence, the trier of fact plays a particularly significant role as the arbiter of credibility: [W]e defer to the [trier of fact's] determination of witnesses' credibility." *United States v. Balzano*, 916 F.2d 1273, 1285 (7th Cir.1990) (citations and quotations omitted). Because the district court's findings of fact are not clearly erroneous, we will not disturb them.

The final question for us is whether Ovadal's constitutional rights were violated by an alleged unwritten and widespread policy that effectively prevented him from engaging in protected speech. When we remanded the case, we noted that there was "no question that Ovadal has been completely banned from all Beltline pedestrian overpasses in the Madison area." *Ovadal*, 416 F.3d at 537. The questions on remand, or so we thought, were whether the effective prohibition was capable of content-neutral application and whether the city could have imposed a ban on protests

occurring on certain days of the week, during certain times, or depending on traffic conditions. *Id.* at 537-38.

When we last considered this case, it was on appeal after a grant of summary judgment in favor of Madison. Accordingly, we viewed all facts in the light most favorable to Ovadal. *Id.* at 535. With the benefit of a trial we now have additional facts that cast doubt on the version of events that the summary judgment proceedings ***631** portrayed. For example, testimony at trial indicated that Ovadal had been on Beltline overpasses with signs at least six times before the dates in question, and had interacted with the Madison police on several of those occasions without any restriction on his activities. Tr. Dec. 12, at 17, 68-69. The only other witness that Ovadal called, his frequent partner in these demonstrations Mike Foht, testified that he had been on Beltline overpasses between ten and twelve times in the years prior to the incidents in question and despite frequent interactions with Madison police had never been forced to move. Tr. Dec. 12, at 92-93. We find it particularly telling that on November 8, 2003 (after the events that led Ovadal to file this suit in which he alleges that he was "chilled and deterred" from exercising his First Amendment rights) Ovadal and Foht were back on a bridge over the Beltline. Tr. Dec. 12, 79-80. Once again, they interacted with a Madison police officer, and the officer informed them that they were free to continue their protest. *Id.* The facts, no longer viewed in a light most favorable to Ovadal, do not support the allegations that there was ever any absolute ban on Ovadal protesting from bridges or that he was chilled and deterred from exercising his rights.

III. CONCLUSION

In summary, the passage of the city ordinance has made any claim for declaratory and injunctive relief moot because the alleged violations cannot be repeated. We defer to the

district court's findings of fact that the actions of the defendants on the specific dates in question were not content-based restrictions on speech. The evidence at trial does not support any allegation that there was a general unwritten policy that placed content-based prohibitions on Ovadal's speech. The record indicates that Ovadal was not chilled or deterred from exercising his First Amendment rights. Therefore, there has been no constitutional harm cognizable under 42 U.S.C. § 1983. Accordingly, the judgment of the district court is AFFIRMED.

APPENDIX B

United States District Court,
W.D. Wisconsin.
Ralph OVADAL, Plaintiff,
v.
CITY OF MADISON WISCONSIN, Richard Williams, Chris Paulson and Patrick Grady,
Defendants.
No. 04-C-322-S.

Dec. 13, 2005.

MEMORANDUM AND ORDER

SHABAZ, J.

*1 After trial to the Court in the above entitled matter, the Court stated additional findings of fact and conclusions of law from the bench and entered judgment in favor of defendants.

FINDINGS OF FACT
On September 2, 2003 the plaintiff's display of a large banners and signs created a traffic hazard. Traffic was slowed at rush hour. Officer Fields was in the traffic slowdown and tried to determine that which was causing the slow down. He determined it was the spectacle caused by plaintiff's signs and banners.

There were many drivers who were angry about the traffic jam which was caused by the spectacle on the overpass. There is no evidence that the drivers were angry at the plaintiff's message. The message was lost on those who were angry about the traffic jam.

Plaintiff himself testified that he could only assume that his message was the reason the drivers were upset.

Numerous drivers had to slam on their brakes for fear of colliding with the vehicles in front of them. Some near accidents and one actual accident were reported.

After Sgt. Paulson heard numerous complaints about traffic safety he requested advice from Deputy District Attorney Schwaemle. She advised that the group was not entitled to stay on the overpass if its conduct was causing a safety hazard to motorists.

Defendant Paulson testified that he did not ask plaintiff to leave the pedestrian overpass because of his message. He testified that he asked him to leave because of the traffic hazard. He further testified that had there been no traffic hazard he would not have asked plaintiff to leave. He further testified that he had neither the resources nor opportunity to confront the angry drivers on the Beltline.

On Saturday, October 11, 2003 defendant Grady stopped near the pedestrian overpass near Park street because of a traffic slow down to 15 to 20 miles an hour. He approached plaintiff's group on the overpass and asked its members to leave because they were creating a traffic hazard. Defendant Grady would not have stopped had he not observed a traffic slow down.

CONCLUSIONS OF LAW

Plaintiff was not banned from the overpass by defendants Grady, Paulson and City of Madison because of the content of his message or the response of the drivers to it. He was asked to leave the overpass because of the spectacle of signs and banners on the overpass was causing a traffic hazard.

The ban was content neutral. It was based on whether a traffic hazard occurred. Any group on a pedestrian overpass with signs or banners that created a traffic hazard would have been asked to leave the overpass.

The ban was necessary to serve a compelling governmental interest and narrowly drawn to achieve that purpose of assuring the safety of motorists.

Plaintiff had ample alternative avenues to express his message including the Farmer's market, the green market, the Alliant Center and neighborhood streets.

Plaintiff's First Amendment rights were not violated. See Frisby v. Schultz, 487 U.S. 474, 480-482, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). Defendants are entitled to judgment in their favor.

ORDER

***2** IT IS ORDERED that judgment be entered in favor of defendants against plaintiff dismissing his complaint and all claims contained therein with prejudice and costs.

APPENDIX C

United States District Court, W.D. Wisconsin.
Ralph OVADAL, Plaintiff,
v.
CITY OF MADISON, WISCONSIN, Richard Williams, Chris Paulson and Patrick Grady, Defendants.
No. 04-C-322-S.

Nov. 22, 2005.

MEMORANDUM AND ORDER

SHABAZ, District Judge.
On August 19, 2005 the above entitled case was remanded by the United States Court of Appeals for the Seventh Circuit for this Court to determine whether plaintiff was deprived of his First Amendment right to free speech by an express policy or widespread custom of the City of Madison, Wisconsin and certain police officials.

On October 14, 2005 defendants Paulson and Grady filed a motion for partial summary judgment on the issue of qualified immunity pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. On October 17, 2005 plaintiff filed a renewed motion for summary judgment. These motions have been fully briefed and are ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Ralph Ovadal is a resident of Green County, Wisconsin. Defendant City of Madison is a Wisconsin municipal corporation. Defendant Richard Williams was the Chief of Police for the City of Madison ***951** at all times material to this complaint. He has since retired and Noble Wray is now the Chief of Police. Defendants Chris Paulson and Patrick Grady are sergeants in the City of Madison Police Department.

On September 2, 2003 plaintiff and several other persons displayed signs and banners expressing their religious viewpoint on homosexuality on a pedestrian overpass located

near the Verona Road exit on the Beltline Highway in the City of Madison. Madison police officers received several 911 reports and noticed that there was a distinct slow down in traffic near the overpass.

The Beltline Highway is a major thoroughfare and a limited access freeway with a fifty-five (55) mile per hour speed limit. It contains three lanes of east bound traffic and three lanes of west bound traffic.

Madison police officers instructed plaintiff and his group to leave the overpass or they would be arrested for disorderly conduct. The group departed without any arrest being made or citations issued.

On Saturday morning October 11, 2003 plaintiff and several others held signs and banners on a pedestrian overpass near the Park Street exit. Sgt. Grady noticed a slow down of Beltline traffic in the area of the demonstration. Sgt. Grady advised plaintiff that he would not be allowed to express his message on the pedestrian overpass. Sgt. Grady said, "And I guess my feeling is that you present a traffic hazard here. You've got people going 60, 70 miles an hour there and they're looking up and seeing you." Plaintiff and his group left the overpass because they reasonably believed if they did not they would be arrested.

MEMORANDUM

In its decision the Court of Appeals states: "The key question is whether the city's rule that no protests may take place on overpasses when those protests cause a traffic hazard is capable of content-neutral application, or whether the city has imposed a content-based and impermissible 'no-Ovadal-on-overpasses' rule." *Ovadal v. City of Madison, Wisconsin,* 416 F.3d 531, 538 (7th Cir.2005).

Defendants continue to argue that there is no policy. The basis for their motion for summary judgment and brief in opposition to plaintiff's motion for summary judgment is that there is no policy. This argument was refuted by the Court of Appeals holding that there is a city rule which prohibits protests on overpasses that cause a traffic hazard.

Specifically the Court of Appeals states as follows:

> If the city had a policy that prohibited not just Ovadal's but all protests and all signs on all Beltline overpasses, this could certainly be a legitimate place and manner restriction because it would be clearly content-neutral. However, the city adamantly refuses to admit that such a policy exists. Instead, it insists that signs are prohibited only if they impair traffic safety.[2] The officers are permitted to decide on an ad hoc basis whether to allow the protest to continue depending on how drivers react to the signs on the pedestrian overpass.
> *Id.*, p. 537 & n. 2.

The Court of Appeals has determined "the issue remains as to whether the ban was narrowly tailored and content neutral". *Id.* at p. 537. The Court of Appeals also advises that if the prohibition was based on the drivers' reactions to plaintiff's message it would not be content neutral. *Id.* at p. 537.

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[2] It appears that no other group than Ovadal's has ever attempted a demonstration on a Beltline overpass. Thus, we do not know whether the police would have allowed other demonstrations to continue.

***952** Plaintiff contends that he was banned from the overpasses because of the opposition by the Beltline drivers to the content of his message. Defendants argue that plaintiff was banned from the overpass because the presence of people and banners on the overpasses and not his message created a traffic hazard. There is a genuine issue of fact as to whether the defendants prohibited plaintiff's signs and banners because a traffic hazard was created by opposition to the message or solely by the plaintiff's presence regardless of his message. This factual issue will be resolved at trial.

Where the ban is found to be content based the city would have to prove that the rule that no protests may take place on overpasses when those protests cause a traffic hazard is necessary to serve a compelling state interest and that the rule is narrowly drawn to achieve that purpose. *Frisby v. Schultz,* 487 U.S. 474, 480, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). A factual issue remains as to whether the ban is narrowly tailored to serve a compelling state interest. This Court is constrained to proceed to trial in light of the Seventh Circuit's decision to determine whether there exists a non-constitutional policy barring demonstrations on the Beltline based on the content of plaintiff's message.

Plaintiff's motion for summary judgment will be denied because factual disputes remain.

Defendants Paulson and Grady move for summary judgment on the issue of qualified immunity. This motion will be denied because factual issues remain. These factual issues are beyond the narrow legal issue of immunity which is subject to an interlocutory appeal. See *Marshall v. Allen, et al.,* 984 F.2d 787 (7th Cir.1993).

ORDER

IT IS ORDERED that defendants' motion for partial summary judgment is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is DENIED.

APPENDIX D

United States Court of Appeals,
Seventh Circuit.
Ralph OVADAL, Plaintiff-Appellant,
v.
CITY OF MADISON, WISCONSIN, Richard Williams, Chris Paulson, and Patrick Grady,
Defendants-Appellees.
No. 04-4030.

Argued April 13, 2005.
Decided July 19, 2005.
Rehearing Denied Aug. 8, 2005.

Before EASTERBROOK, KANNE, and SYKES, Circuit Judges.

KANNE, Circuit Judge.

Ralph Ovadal participated in a protest against homosexuality on a pedestrian overpass above a busy highway in Madison, Wisconsin. When drivers, angry with the message displayed, began driving erratically and causing congestion on the highway, police officers stepped in and threatened Ovadal with arrest if he did not end the demonstration. Ovadal was ultimately banned from any such protest on any Beltline pedestrian overpass. The district court found that the restriction on speech was justified and granted summary judgment in favor of the defendants. We find that there exist genuine issues of material fact, so we reverse and remand.

I. History

Ralph Ovadal is a Christian minister who wishes to share his religious views with the public through the use of signs and

banners. At about 4:20 P.M., on Tuesday, September 2, 2003 (the day after Labor Day), Ovadal and several of his colleagues gathered on a pedestrian overpass spanning the Beltline highway in Madison, and displayed large signs--held by protesters above the sides of the overpass--which read, "Homosexuality is sin" and "Christ can set you free." The lettering on the bright yellow signs and banners was very large so that the messages would be visible from long distances. Ovadal chose the Beltline because it is a very busy highway used by both local and out-of-state drivers and, therefore, his audience would be larger and more diverse than on other local roads. Also, the fenced-in pedestrian overpasses were deemed safe locations for these demonstrations because they are twenty feet above the road.

While the protest was taking place, Curtis Fields, a Madison police officer, noticed substantial congestion on the Beltline in the area where Ovadal's signs were displayed. Officer Fields reported this traffic problem to dispatch and was informed that several people had already called in complaining about the protest and stating that they had been forced to slam on their brakes in order to avoid accidents. Some drivers responded to the protesters with angry hand gestures, and one woman even came up through her sunroof to yell at Ovadal.

Officer Fields made an effort to determine whether Ovadal and his group had a constitutional right to conduct their protest on the overpass. Fields asked Deputy District Attorney Judy Schwaemle for advice, and she opined that the protesters could be ordered to relocate if the officers felt that the protest was creating unsafe driving conditions. Fields then approached Ovadal and asked him to take his demonstration elsewhere. He told Ovadal ***534** that the police had received several calls "from disgruntled people.

It's causing a disturbance."[1] A short time later, Fields conferred with another officer and notified Ovadal that he would be allowed to stay on the overpass. Then, after the protest had continued for approximately 30 more minutes, at about 5:20 P.M., Fields returned and advised Ovadal that he would have to leave the area after all. Fields told Ovadal that there had been some reports of near accidents and that he was under orders to have Ovadal leave the area. Fields informed Ovadal that if he did not leave the overpass he would be arrested for disorderly conduct because individuals were "disturbed" by Ovadal's message. In order to clarify, Ovadal asked, "So, under threat of arrest, everyone has to leave the bridge because there have been several anonymous complaints?" Officer Fields responded in the affirmative, and Ovadal left the overpass.

As he was leaving, Ovadal encountered Sergeant Chris Paulson, who had been in contact with Officer Fields. Paulson told Ovadal that the police had received several reports from drivers who were angered by the signs and had been forced to slam on their brakes. Paulson denied Ovadal's request to display the signs so that only the slow moving lanes could see them. Ovadal asked whether there was any time of day when he would be permitted to display the signs on the overpass, and Paulson informed him that the overpass would not ever be suitable for his demonstration. Ovadal asked to speak to someone higher in the line of command and Paulson stated that he was in charge. Upon further questioning about whether there was any time of day that Ovadal could protest on the overpass, Paulson told Ovadal that he and the Madison Police Department did support free speech, but that "[t]he reality is on this particular bridge, an overpass on a Beltline where the traffic ... can be intense, this is my decision. The answer is no."

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[1] One of Ovadal's colleagues videotaped all of the conversations that Ovadal had with the police officers that are relevant to this litigation.

Ovadal later contacted the Madison Police Department to see if the policy prohibiting his protest could be changed. Captain Silverwood told Ovadal that he would forward the request for clarification of the policy to the City Attorney. The City Attorney did not respond to Ovadal's request.

On Saturday October 11, 2003, at about 8:30 A.M., Ovadal and his colleagues set up another protest on a pedestrian overpass which they believed to be outside the city limits of Madison. Ovadal had protested on this overpass previously without incident. However, later that morning, Madison Police Sergeant Patrick Grady approached the protesters and asked them to leave. Sergeant Grady told Ovadal that his group "present[s] a traffic hazard here. You've got people going 60, 70 miles an hour there and they're looking up and seeing you." Grady informed Ovadal that he would not be allowed to display signs on any pedestrian overpasses in the Madison area.

On October 31, 2003, Ovadal wrote a letter, through counsel, to Madison Police Chief Richard Williams explaining his belief that the policy banning signs on the pedestrian overpasses deprived him of his constitutional rights. Williams did not respond to Ovadal's letter. Although Ovadal still wishes to display his signs on the overpasses, he has not done so because he is afraid he will be arrested. Therefore, he brought this lawsuit under 42 U.S.C. § 1983 asking for injunctive relief, declaratory relief, and damages.

***535** II. Analysis

This case comes to us on a grant of summary judgment in favor of the defendants. The case is thus subject to de novo review, and we will review the record in the light most favorable to Ovadal, the nonmoving party. *See Grayson v. City of Chicago*, 317 F.3d 745, 749 (7th Cir.2003).

Summary judgment is properly granted when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Ovadal brings this suit against the City of Madison, Richard Williams in his official capacity as police chief, and Chris Paulson and Patrick Grady individually and in their official capacities as police officers. In order to establish liability against the city under 42 U.S.C. § 1983, Ovadal must show that: "(1) he suffered a deprivation of a federal right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority for the City; which (3) was the proximate cause of his injury." *Ineco v. City of Chicago*, 286 F.3d 994, 998 (7th Cir.2002). To prove that the individual officers are liable, Ovadal must show that "(1) he was deprived of a federal right and (2) that the deprivation was imposed upon him by one or more persons acting under color of state law." *Id.* at 997-98.

Ovadal argues that the Wisconsin disorderly conduct statute is unconstitutional as applied to him in this instance because it is vague and it was applied specifically to curb speech that is protected by the First Amendment. The statute prohibits people from engaging "in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance ...." Wis. Stat. § 947.01. Although it is clear that Ovadal's conduct does not fall into any of the statute's enumerated categories, the defendants claim that Ovadal's protests constituted "otherwise disorderly conduct." They point out that even if typical protest activities would not fall under the statute's prohibitions, the surrounding circumstances are of utmost importance when determining whether conduct is "disorderly." *City of Oak*

Creek v. King, 148 Wis.2d 532, 436 N.W.2d 285, 288 (1989). The Wisconsin Supreme Court has explained that in cases where convictions resulted from "otherwise disorderly conduct," it was because the specific conduct was inappropriate in light of the particular circumstances involved. *Id.* at 289. The defendants argue that because conducting a protest on a pedestrian overpass distracts drivers and creates a safety hazard, it is inappropriate and can be punished under the disorderly conduct statute.

While it is true that the surrounding circumstances must be considered, it is also true that the city cannot threaten to prosecute protesters under this statute if the threats are nothing more than a pretext for stopping unpopular, yet protected, speech. *See Zwicker v. Boll*, 270 F.Supp. 131, 135 (W.D.Wis.1967), aff'd, 391 U.S. 353, 88 S.Ct. 1666, 20 L.Ed.2d 642 (1968). "[O]ne may not be convicted for disorderly conduct ... merely because he espouses unpopular ideas or merely because others are thereby stimulated to commit disorderly acts; on the other hand, conduct which is in fact disorderly is not insulated because it is perpetrated while engaged in a protest demonstration." *Id.* Conduct is usually considered disorderly when the acts or words are "of a nature to corrupt the public morals or to outrage the sense of public decency ...." *King*, 436 N.W.2d at 288 (citation omitted).

A law or policy is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that ***536** people of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). The Wisconsin Supreme Court has considered the disorderly conduct statute in the context of protests and "determined that the statute sufficiently identified the type of behavior which the legislature intended to be contrary to law

and that the statute was not subject to an attack for vagueness." *State v. Zwicker*, 41 Wis.2d 497, 164 N.W.2d 512, 517 (1969). "The fact that a statute fails to itemize with particularity every possible kind of conduct which would violate such statute does not make it constitutionally vague." *State v. Givens*, 28 Wis.2d 109, 135 N.W.2d 780, 784 (1965). Whether Ovadal's peaceful protest rises to the level of disorderly conduct because it took place on a Beltline overpass is an open question of state law that we need not address, but we find that the disorderly conduct statute is not unconstitutionally vague as applied to him.

Ovadal's use of signs and banners to express a religious viewpoint is at the core of the speech that the First Amendment protects. *See Boos v. Barry*, 485 U.S. 312, 318, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988); *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945). There is no question that the morality of homosexuality is a contentious issue, but unpopular speech remains protected by the First Amendment; in fact, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

This is not to say, however, that Ovadal's right to express his views is without limit. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The extent of limitation that is permissible is determined by the forum in which the speech takes place. *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988). The district court found that the pedestrian overpass was a traditional public forum because it was a portion of a public sidewalk. *See United States v. Grace*, 461 U.S. 171, 179, 103 S.Ct. 1702, 75

L.Ed.2d 736 (1983). "Time out of mind, public streets and sidewalks have been used for public assembly and debate, the hallmarks of a traditional public forum." *Frisby*, 487 U.S. at 480, 108 S.Ct. 2495 (internal quotations omitted). We agree with the district court's conclusion that "[a] public sidewalk does not lose its status as a traditional public forum when it passes over a highway overpass." All public sidewalks "are held in the public trust and are properly considered traditional public fora." *Frisby,* 487 U.S. at 481, 108 S.Ct. 2495. Thus, as the district court correctly determined, Ovadal's protest occurred in a public forum.

When speech takes place in a traditional public forum, it receives heightened constitutional protection. The government may restrict the time, place, and manner of the speech, but only if the restrictions are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative means of communication. *Id.* If a restriction is based on the content of the speech, it is unconstitutional unless the state can prove that the regulation is necessary to serve a compelling state interest and that the regulation is narrowly drawn to achieve that end. *Id.* So, in order to determine the appropriate level of scrutiny, it is necessary to first decide whether the restriction is based on the content of the speech. *Id.*

The city argues that prohibiting Ovadal's protest on any Beltline overpass was ***537** a proper place and manner restriction on his speech. The officers treated Ovadal respectfully, the city insists, and ended the protest only because it created a safety hazard, not because the officers disagreed with the message. Ovadal, however, emphasizes that every proffered justification for ending the protest is directly related to the reactions of the persons viewing the signs. For example, Officer Fields told Ovadal that he had to leave the bridge because several drivers, "disturbed" by the

messages on the signs, had called in and complained about the protest. In addition, Sergeant Paulson told Ovadal that the police had received reports from drivers who were angered by the signs and that the officers were concerned that drivers would "slam on their brakes because they're upset."

If the city had a policy that prohibited not just Ovadal's, but all protests and all signs on all Beltline overpasses, this could certainly be a legitimate place and manner restriction because it would be clearly content-neutral. However, the city adamantly refuses to admit that such a policy exists. Instead, it insists that signs are prohibited only if they impair traffic safety.[2] The officers are permitted to decide on an ad hoc basis whether to allow the protest to continue depending on how drivers react to the signs on the pedestrian overpass.

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). "Speech cannot ... be punished or banned, simply because it might offend" those who hear it. *Id.* at 134-35, 112 S.Ct. 2395. It cannot be denied that drivers who yelled, gestured, and slammed on their brakes when they saw Ovadal's signs created a safety hazard on the Beltline. However, it is the reckless drivers, not Ovadal, who should have been dealt with by the police, perhaps in conjunction with an appropriate time, place, and manner restriction on Ovadal. The police must preserve order when unpopular speech disrupts it; "[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d

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[2] It appears that no group other than Ovadal's has ever attempted a demonstration on a Beltline overpass. Thus, we do not know whether the police would have allowed other demonstrations to continue.

1295, 1299 (7th Cir.1993).

If the restriction of Ovadal's speech was content-based, the city must prove that prohibiting Ovadal from protesting on pedestrian walkways above the Beltline is narrowly tailored and necessary to serve a compelling state interest. Ovadal concedes that the city has an interest in protecting public safety and promoting the free flow of traffic on public streets. *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). But, the city may still only regulate speech "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of [the government's legitimate] interest." *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984).

There remain genuine issues of material fact which bear on whether Ovadal was deprived of his First Amendment right to free speech by an express policy or widespread custom of the City of Madison and certain police officials. While there is no question that Ovadal has been completely banned from all Beltline pedestrian overpasses in the Madison area, the issue remains as to whether the ban was narrowly tailored and content-neutral. Did the police ***538** impose a "heckler's veto" and would the same absolute "ad hoc" ban have been imposed on any display occurring on a Beltline pedestrian overpass? Was it possible that the city could have imposed a ban on protests occurring on certain days of the week, during certain times of day, or depending on traffic conditions, or was an absolute ban the only option available to the city under the circumstances? The key question is whether the city's rule that no protests may take place on overpasses when those protests cause a traffic hazard is capable of content-neutral application, or whether the city has imposed a content-based and impermissible "no-Ovadal-on-

overpasses" rule. Matters of material fact such as these need to be resolved in order to determine whether Ovadal's First Amendment rights have been violated; therefore, we must remand this case to the district court.

III. Conclusion

For the reasons set forth above, the district court's grant of summary judgment in favor of the defendants is REVERSED, and this case is REMANDED for further proceedings.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH OVADAL,
Plaintiff,

v.

MEMORANDUM AND ORDER
04-C-322-S

CITY OF MADISON, WISCONSIN, RICHARD WILLIAMS, CHRIS PAULSON and PATRICK GRADY,
Defendants.

Plaintiff Ralph Ovadal commenced this civil rights action pursuant to 42 U.S.C. § 1983 seeking declaratory and injunctive relief against defendant City of Madison, Wisconsin and defendants Richard Williams, Christ Paulson, and Patrick Grady in their capacity as officers of the City of Madison Police Department. Plaintiff alleges that defendants violated his First and Fourteenth Amendment rights to free speech, free exercise of religion, assembly, and due process when officers from the City of Madison Police Department halted a demonstration that he was conducting on a highway overpass in the City of Madison, Wisconsin. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. The matter is presently before the Court on cross-motions for summary judgment. The following facts are undisputed. [2]

BACKGROUND

Plaintiff Ralph Ovadal is a resident of Green County, Wisconsin. Defendant City of Madison is a municipal governmental authority a subdivision of the State of Wisconsin. Defendant Richard Williams was the Chief of Police for the City of Madison until April 2, 2004. Defendant Chris Paulson is a Sergeant with the City of Madison Police Department. In his official capacity Paulson serves in a supervisory role and is responsible for the enforcement of the City of Madison's laws, ordinances and policies. Defendant Patrick Grady is a Sergeant with the City of Madison Police Department. In his official capacity Grady enforces the City of Madison's laws, ordinances, and policies.

The Highway 12/18 "Beltline" is a limited access freeway with a 55 mile per hour speed limit. The Beltline is one of the main thoroughfares connecting downtown Madison, its various neighborhoods, suburbs, and surrounding communities. It spans three eastbound and three westbound lanes. A high volume of commuter traffic on the Beltline results in varying degrees of congestion at predicable times each day. At times of more severe congestion drivers must frequently and suddenly slow down or stop their vehicles. Rear-end accidents are not uncommon. There are approximately 60 accidents and 400 to 500 other incidents on the Beltline each month. [3]

In addition to several overpasses that permit both vehicular and pedestrian traffic to pass safely over the Beltline, narrower pedestrian-only overpasses span the Beltline at various points of convenience. These pedestrian overpasses are located about 20 feet above the Beltline's traffic lanes. They consist of a footpath crossing a bridge enclosed in chain-link fencing.

At approximately 4:20 p.m. on September 2, 2003 plaintiff and a number of his colleagues gathered on a pedestrian overpass spanning the Beltline near the Verona Street exit in the City of Madison. Led by plaintiff the

demonstrators displayed two large yellow banner that read "Homosexuality is a Sinn along with smaller signs to express their religious viewpoints on homosexuality. Plaintiff has displayed signs and banners on pedestrian overpasses in the City and Town of Madison on at least six occasions. Plaintiff prefers Beltline overpasses for his demonstrations because the vehicles traveling on the Beltline provide him with a large audience for his message.

There was a distinct slowdown in traffic on the Beltline in the area where plaintiff's group was displaying its signs and banners. Officer Fields of the City of Madison Police Department noted the slowdown as he was traveling on the Beltline. He applied his brakes several times in traffic, and at one point he had to stop his vehicle completely because traffic in his lane was not moving. As Fields tried to determine the cause of the traffic [4] problem, he noted a group of 10 to 15 people on the pedestrian overpass facing both the east- and westbound lanes who were holding signs and banners. He reported what he had seen to the police dispatch center. In response the dispatcher advised him that several people had called in to complain that they were very upset about the protest taking place on the walkway and were concerned about its impact on traffic safety. The police received complaints from drivers who reported being forced to brake rapidly to prevent a collision with the vehicle in front of them. One accident occurred during the time that plaintiff conducted his demonstration, but there is no evidence whether it was in any way related to plaintiff's demonstration.

At approximately 4:40 p.m., about twenty minutes after the demonstration began, the demonstrators were approached by Officers Fields and Cummings of the City of Madison Police Department. Officer Fields informed plaintiff that the police had received several complaints concerning the demonstration.

For several minutes Fields and plaintiff discussed his right to remain on the pedestrian overpass. Plaintiff asserted that his First Amendment rights would be violated if Fields required him to leave the overpass under threat of arrest. Plaintiff pointed out that there were several large billboards visible from the Beltline including one nearby advertisement for the Hooters restaurant chain that featured an image purported to be one of the chain's scantily [5] clad waitresses. While Fields spoke with plaintiff he observed several motorists on the Beltline respond to the demonstrators with "angry hand gestures." Other drivers honked their horns: some in support and some to express their disagreement with plaintiff's message. One woman, while driving, came up through her sunroof to scream obscenities at the demonstrators. Other drivers were forced to respond to the dangerous conditions created by these motorists' careless driving.

At approximately 4:50 p.m., Fields conferred with his supervisor Sergeant Chris Paulson via radio. Paulson contacted Deputy District Attorney Judy Schwaemle. She advised Paulson that the group did not have a right to continue its demonstration if it was causing a safety hazard to motorists. Paulson relayed this advice to Fields. After this consultation Fields advised plaintiff that he was not being ordered off the bridge at that time. The officers then departed. The police continued to receive complaints related to the demonstration.

At approximately 5:20 p.m. Fields returned to the overpass and advised plaintiff that he would have to leave or be arrested. The demonstrators prepared to leave the overpass until approximately 5: 30 p. m. when Fields received a radio call from Paulson advising him to allow plaintiff to remain on the overpass until he could arrive at the scene. On Paulson's way to the overpass, however, he was delayed in the slow moving Beltline [6] traffic. Paulson

radioed Fields and ordered him to clear the overpass. Fields informed plaintiff and his fellow demonstrators that they would have to leave the overpass or be arrested for disorderly conduct. Officer Fields refused to respond to plaintiff's request that he specify a permissible time or circumstances under which he could return and resume his demonstration.

As the group was leaving the area plaintiff encountered Paulson who stated that the police department had received several complaints from drivers who had became angry after viewing plaintiff's signs and slammed on their brakes as a result. Plaintiff asked Paulson if he could speak to a captain or someone else higher in command, but this request was denied. Paulson advised plaintiff that he was the supervisor in charge of the area. Plaintiff asked if he could return to the bridge if he only displayed his message to the slow-moving traffic lanes, but Paulson denied this request as well. Paulson also refused to respond to plaintiff's request that he specify a permissible time or circumstances under which they could return. Thereafter, the group departed and no arrests were made.

On October 11, 2003 plaintiff and his colleagues again gathered on a pedestrian overpass spanning the Beltline. This time they selected an overpass near the Park Street exit. Plaintiff had displayed signs at this location in the past without police [7] interference. He believed it to be outside the jurisdiction of the City of Madison Police Department.

After a few minutes the demonstrators were approached by Sergeant Patrick Grady, a City of Madison Police Department Officer. After a brief discussion Officer Grady informed plaintiff that he could not display his message through the use of a sign on the pedestrian overpass because it presented a traffic hazard. Grady added that plaintiff could use Greenway Cross, a two-lane street in

Madison. Plaintiff did not agree that this was a reasonable alternative because it would force him to communicate to a much smaller audience. After a brief discussion Grady reiterated that plaintiff would not be allowed to display signs on the pedestrian overpass. Thereafter, plaintiff and his fellow demonstrators departed under the threat of arrest.

On October 31, 2003 plaintiff, through his counsel, wrote to Chief Williams, Police Chief for the City of Madison, seeking clarification of the police department's policy pertaining to signs on pedestrian overpasses. He received no response.

Plaintiff now fears arrest, and accordingly he has refrained from leading other demonstrations on pedestrian overpasses in the City of Madison. Consequently, he commenced the present action seeking declaratory and injunctive relief against defendants. [8]

MEMORANDUM

The matter is presently before the Court on cross-motions for summary judgment. Plaintiff argues that his First and Fourteenth Amendment rights to free speech, free exercise of religion, assembly, and due process were violated when officers from the City of Madison Police Department halted his highway overpass demonstrations. Defendants argues that plaintiff was not deprived of a federal right, nor was such a deprivation the result of an express municipal policy, widespread custom, or deliberate act of a decisionmaker with final policymaking authority for the City of Madison. Defendants also present a qualified immunity defense as to the officers.

Summary judgment is appropriate when, after both parties have the opportunity to submit evidence in support of their respective positions and the Court has reviewed such evidence in the light most favorable to the nonmovant, there remains no genuine issue of material fact and the moving

party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

A fact is material only if it might affect the outcome of the suit under the governing law. Disputes over unnecessary or irrelevant facts will not preclude summary judgment. A factual issue is genuine only if the evidence is such that a reasonable factfinder, applying the appropriate evidentiary standard of proof, could return a verdict for the nonmoving party. *Anderson v.* [9] *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986). Under Rule 56(e) it is the obligation of the nonmoving party to set forth specific facts showing that there is a genuine issue for trial.

To establish liability for the City of Madison plaintiff must prove that he suffered a deprivation of a federal right as a result of either an express municipal policy, widespread custom, or deliberate act of a decisionmaker with final policymaking authority for the City which was the proximate cause of his injury. *Ineco v. City of Chicago*, 286 F.3d 994, 998 (7th Cir. 2002). To prove the officers' liability he must show that he was deprived of a federal right and that the deprivation was imposed upon him by one or more persons acting under color of state law. *Id.* at 997-98. The parties agree that there are no genuine issues of material fact. Accordingly, the matter is properly resolved as a matter of law. Fed. R. Civ. P. 56(c).

Plaintiff and his fellow demonstrators were ordered to cease their demonstrations and leave the Beltline pedestrian overpasses on two occasions under threat of arrest for disorderly conduct. Plaintiff first argues that the disorderly conduct statute is unconstitutionally vague as applied to his conduct.

Wisconsin's disorderly conduct statute provides as follows: "Whoever, in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in

which the [10] conduct tends to cause or provoke a disturbance is guilty of a Class B misdemeanor." Wis. Stat. § 947.01. To prosecute under the disorderly conduct statute, the state must prove (1) that the accused engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or similar disorderly conduct and (2) that the accused's conduct occurred under circumstances where such conduct tends to cause or provoke a disturbance. "Under both elements, it is the combination of conduct and circumstances that is crucial in applying the statute to a particular situation." *State v. Douglas D.*, 2001 WI 47, ¶ 15, 243 Wis. 2d 204, 626 N.W.2d 725 (alterations and internal quotation marks omitted) (quoting *State v. Maker*, 48 Wis. 2d 612, 616, 180 N.W.2d 707 (1970)).

Defendants argue that plaintiff's conduct constituted "otherwise disorderly conduct." In response to overbreadth and vagueness challenges, the Wisconsin Supreme Court has construed this catch-all phrase to mean conduct having a similar tendency to disrupt good order and to provoke a disturbance. *State v. Givens*, 28 Wis. 2d 109, 115, 135 N.W.2d 780 (1965).

The Wisconsin Supreme Court has confirmed that the mere propounding of unpopular views will not qualify for conviction under the disorderly conduct statute. *State v. Zwicker*, 41 Wis. 2d 497, 509, 164 N.W.2d 512 (1969). Instead, the Court has recognized only two circumstances in which conduct intertwined with speech can constitute "disorderly conduct" without abridging the speaker's [11] constitutional liberties. First, those "categories of speech that have been traditionally regarded as beyond the protection of the First Amendment" can constitute disorderly conduct (e.g., libel, obscenity, fighting words, incitement, true threats). *State v. A.S.*, 243 Wis. 2d 173, 189-190, 626 N.W.2d 712 (2001). Second, otherwise protected speech may constitute disorderly conduct if it is "carried out in a manner

which is violent, abusive, indecent, boisterous or unreasonably loud, or conduct similar thereto, and under circumstances in which such conduct tends to cause or provoke a disturbance." *Zwicker*, 41 Wis. 2d at 509, 164 N.W.2d 512.

Defendants argue that the officers reasonably concluded that plaintiff's conduct, under the circumstances presented, tended to provoke a disturbance and create a threat to the safety of those traveling on the Beltline. Defendants further argue that plaintiff should have been aware that by conducting his demonstrations in such a manner he could be prosecuted for disorderly conduct.

Plaintiff argues that no ordinary person would understand the disorderly conduct statute to prohibit him from merely standing on a pedestrian overpass and displaying a sign. To the extent that defendants took into consideration the reactions of those traveling on the Beltline, plaintiff argues that such a consideration constitutes a "hecklers veto," which neither the disorderly conduct statute as interpreted by the Wisconsin Supreme Court nor the First Amendment can reasonably be read to sanction. At this contention, [12] which is inextricably intertwined with his free speech claim, lies the crux of his due process claim. Consequently, the Court must first determine the extent to which the First Amendment constrains police officers from considering the reactions of those traveling upon the Beltway when applying the disorderly conduct statute to plaintiff's conduct.

There can be no question that the content of plaintiff's speech lies safely within the protections of the First Amendment. The content of plaintiff's banners (e.g., "Homosexuality is a sin") is religious speech involving issues of public concern. Those engaged in picketing issues of public concern are protected by the First Amendment. Traditionally, government restrictions of such speech have

been subjected to careful scrutiny. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). Defendants have not associated plaintiff's speech with any of those categories traditionally regarded as beyond the protection of the First Amendment.

Plaintiff's speech took place in a traditional public forum. Public sidewalks and streets are traditional public fora that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (quoting *Hague v. CIO*, 307 U.S. 496,515 (1939) (Roberts, J.)). Plaintiff's demonstration occurred on a pedestrian overpass--a portion of a public sidewalk that crossed a bridge over a public street. A public sidewalk does not [13] lose its status as a traditional public forum when it passes over a highway overpass. *Faustin v. City of Denver*, 104 F. Supp. 2d 1280 (D. Colo. 2001), *aff'd in relevant part*, 268 F.3d 942 (10th Cir. 2001); *Lyte v. Brewer*, 77 F. Supp. 2d 730 (E.D. Va. 1999). While the particular characteristics of highway overpasses may well inform the Court's application of the relevant test, they do not lead to a different test. *See Frisby*, 487 U.S. at 480-81. The application of the disorderly conduct statute to plaintiff's activity "must be judged against the stringent standards that [the United States Supreme Court has] established for restrictions on speech in traditional public fora." *Id.*

The government has a difficult burden to carry when it attempts to regulate protected speech in a public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). However, even a public forum may be subjected to reasonable restrictions on the time, place, and manner of protected speech, provided that such restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the

information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). Defendants argue that the officers' application of the disorderly conduct statute to plaintiff's [14] conduct constituted a reasonable time, place, and manner restriction.

In evaluating time, place, and manner restrictions, the first question is whether the restriction is justified without reference to the content of the regulated speech. The principal inquiry is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Id.* (citing *Community for Creative Non-Violence*, 468 U.S. at 295). Even a facially neutral ban on disorderly conduct may not be applied to otherwise protected speech that is "disorderly" solely because of the message it conveys. On the other hand, a regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive conduct is content neutral so long as it is justified without reference to the content of the regulated speech. *Id.* at 791-92.

Defendants argue that the officers properly responded to plaintiff's demonstration because, under the circumstances, it was being conducted in an unreasonably distracting manner. As to the first incident, they point out that the demonstration was interfering with the officers' duty to keep the Beltway safe, open, and available for movement. After major traffic slow ups on the Beltline and numerous calls from people reporting near accidents, Officer Fields advised plaintiff that he and his fellow protestors [15] would have to leave the overpass due to the hazard to public safety they were creating. Plaintiff was advised that he would be cited for disorderly conduct if he failed to comply with

police requests and discontinue activities that were causing a traffic hazard.

In *Cantwell v. Connecticut*, the United States Supreme Court recognized the "obvious" power of the state to prevent interferences with traffic upon the public streets and other immediate threats to public safety, peace, or order. 310 U.S. 296, 308 (1940); *accord Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002). In *Cox v. Louisiana*, the United States Supreme Court further observed:

> The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public

> or private building, and allow no one to pass who did not agree to listen to their exhortations.

379 U.S. 536, 554-55 (1965). Finally, in *City of Ladue v. Gilleo*, the United States Supreme Court expressly noted that banners and [16] other signs may distract drivers and accordingly are subject to municipal police powers. 512 U.S. 43, 48 (1994).

Plaintiff correctly observes, however, that while the state has a legitimate interest in promoting highway safety, this interest cannot be invoked to justify viewpoint discrimination. "[E]ven a traffic regulation cannot discriminate on the basis of content unless there are clear reasons for the distinctions." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975). Justice Douglas observed in *Zwicker v. Boll* that disorderly conduct statutes "historically have been used in reprisal against unpopular groups or persons who espouse unpopular causes." 391 U.S. 353, 354 (1968) (Douglas, J., dissenting). The Seventh Circuit has similarly cautioned that decision-makers must not be allowed to "blindly invoke safety and congestion concerns without more" to justify the suppression of unpopular speech. *Weinberg*, 310 F.3d at 1038.

There can be no serious doubt that some of the complaints received by the Madison Police Department were the product of the complainants' disapproval with plaintiff's message. Under the circumstances, even some of those complaints that specifically referenced traffic safety can be fairly attributed to the complainants' motivating desire to suppress plaintiff's message. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 880 (1997). To charge plaintiff with disorderly conduct simply because his message [17] displeased onlookers would obviously encroach on First Amendment rights. *Gregory v. City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring).

Moreover, while the medium of plaintiff's communication—the large banners and signs--undoubtedly distracted drivers on the Beltline, it cannot be denied that many severe and dangerous responses to plaintiff's demonstration were reactions not to the medium but to his message. Outside the home the First Amendment places the burden not upon the speaker but upon the viewer to avert his or her eyes from messages that offend the viewer's religious, moral, and political sensibilities. *Id.* at 210-11. The uncontrolled official suppression of the speaker cannot be made a substitute for the duty to maintain order. *Niemotko v. Maryland*, 340 U.S. 268, 289 (1951) (Frankfurter, J., concurring in the result in *Feiner v. New York*, 340 U.S. 315 (1951)) (internal quotation marks omitted) (quoting *Hague*, 307 U.S. at 516 (Roberts, J.)).

In cases such as this, where the rights of the speaker are in tension with those of the "heckler" audience and other occupants of the forum, "the potential for disorder may tempt the government to arrest or remove either the hecklers, the speaker or both." 1 Rodney A. Smolla, *Smolla and Nimmer on Freedom of Speech* § 10:37 (2004). The proper accommodation of this tension "presents a problem that always tests wisdom and often calls for immediate and vigorous action to preserve public order and safety." *Terminiello* [18] *v. City of Chicago*, 337 U.S. 1, 34 (1949) (Jackson, J., dissenting); *accord Niemotko*, 340 U.S. at 275 (Frankfurter, J., concurring in the result in *Feiner*) ("Adjustment of the inevitable conflict between free speech and other interests is a problem as persistent as it is perplexing.").

A function of the First Amendment is to invite dispute. "It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello*, 337 U.S. at 4-5 (citations omitted).

Unfortunately, experience has proved that "the law is more tolerant of discussion than are most individuals or communities." *Id.* at 32 (Jackson, J., dissenting). The task of moderating the debate between demonstrators and counter-demonstrators will often fall to the police, as it did here. To determine whether the police acted with due regard for plaintiff's First Amendment rights, the Court must carefully examine the officers' conduct with practical wisdom in light of the circumstances presented.

As previously noted, traffic on the Beltline moves at an average speed of at least 55 mile per hour. The Beltline is one of Madison's main thoroughfares. It frequently becomes congested, and accidents frequently result from that congestion. Plaintiff's banners were visible from the Beltline. In the course of the first incident, several fast and slow moving vehicles were operated in an [19] unsafe manner while their occupants attempted to engage plaintiff in a counter-demonstration. To be sure, it is these drivers, not plaintiff, who acted in the most disorderly manner. However, as a practical matter, it would be very difficult for the police to respond individually to each of these drivers without actually contributing to the congestion and attendant unsafe conditions.

While police are generally well-suited to slow traffic, they are considerably less effective at speeding up traffic. A sufficient number of vehicles reacted to plaintiff's speech that the officers' efforts to respond to each would undoubtedly have been counterproductive. Had the police so intervened traffic would likely have come to a complete stop. While a complete stoppage of traffic would undoubtedly have facilitated the debate between the demonstrators and counter-demonstrators, neither has a right to insist upon a street meeting in the middle of the Beltline at rush hour as a form of freedom of speech or assembly. *Cox*, 379 U.S. at 554-55. The rights of those non-participants who were

trapped in their vehicles behind this lively discussion must also be taken into account. The occupants of these vehicles did not wish to veto plaintiff's speech, they simply wished to continue along the Beltline unimpeded.

Under these circumstances plaintiff should have realized, as did the officers, that the Beltline is simply an inappropriate place to hold such a debate. Such was the determination of [20] Officers Fields and Paulson when they were confronted with a dangerous traffic situation to which plaintiff's protest undoubtedly contributed. Such was the determination of Officer Grady who acted to head off another dangerous traffic situation before it materialized. With plaintiff's help, defendants have learned that Beltline overpasses are an unreasonable place for pedestrians to communicate with vehicle occupants. Accordingly, the officers' decision to prohibit this form of communication because it tends to interfere with the free and safe flow of traffic on the Beltline constitutes a content neutral restriction.

Plaintiff's arguments that defendants' restriction is not narrowly tailored and does not leave open ample alternative means of communication are closely related. Plaintiff believes that Beltline pedestrian overpasses provide him with a unique and irreplaceable forum because they ensure that he will reach a large audience while keeping him safe from the traffic below. Plaintiff argues that by refusing to specify a particular time or particular circumstances under which he can conduct his protest, defendants have failed to narrowly tailor their restriction. Similarly, plaintiff argues that there are no ample alternative means of communication.

These arguments are unpersuasive. Defendants reasonably concluded that the unique, inherent characteristics of Beltline overpasses simply make them inappropriate places to hold [21] demonstrations because there is too great a risk of traffic disruptions. Defendants' restriction is narrowly tailored to serve their significant

interest in preventing traffic accidents and congestion on the Beltline. The restriction also leaves open ample alternative means of communication. Contrary to plaintiff's suggestion, travelers on the Beltline do not comprise a materially distinct audience for his message. Plaintiff has produced no evidence that his message is specially related to those potential listeners traveling the Beltline. The only nexus plaintiff suggests is that the Beltline audience is a large one, but "[a]n adequate alternative does not have to be the speaker's first or best choice or one that provides the same audience or impact for the speech." *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (citation omitted) (citing *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981); *Rock Against Racism*, 491 U.S. at 802; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 809 (1985))

Accordingly, the Court finds defendants' restriction on plaintiff's demonstrations to be a reasonable time, place, and manner restriction. Defendants have not violated plaintiff's right to free speech, free exercise of religion, or peaceful assembly. Nor have defendants deprived plaintiff of due process of law. Once plaintiff realized that his conduct was endangering the safety of those traveling the Beltline, he should have reasonably understood [22] that he could be prosecuted for disorderly conduct. As Justice Frankfurter once observed, "Where conduct is within the allowable limits of free speech, the police are peace officers for the speaker as well as for his hearers. But the power effectively to preserve order cannot be displaced by giving a speaker complete immunity." *Niemotko*, 340 U.S. at 289 (Frankfurter, J., concurring in the result in *Feiner*)

Because the Court has determined that plaintiff has not suffered a deprivation of a federal right, his motion for summary judgment will be denied and defendants' will be granted.

ORDER

IT IS ORDERED that plaintiff's motion for summary judgment is DENIED.

It IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants and against plaintiff dismissing plaintiff's complaint and all claims contained therein with prejudice and costs.

Entered this 8th day of November, 2004.

BY THE COURT:

JOHN C. SHABAZ

District Judge

APPENDIX F

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 2007

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. DIANE S. SYKES, *Circuit Judge*

No. 05-4723

RALPH OVADAL,
Plaintiff-Appellant,

Appeal from the United States District Court for the Western District of Wisconsin

v.

No. 04 C 322

CITY OF MADISON, WISCONSIN, RICHARD WILLIAMS, CHRIS PAULSON, and PATRICK GRADY,
Defendants-Appellees,

John C. Shabaz,
Judge

ORDER

On consideration of the petition for rehearing *en banc*, no judge in active service has requested a vote on the petition for rehearing *en banc* and the judges of the panel have voted to deny rehearing. It is, therefore, ORDERED

that the petition for rehearing *en banc* is DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

* *

RALPH OVADAL,

Plaintiff,

vs.

Case No. 04-C-0322-S

CITY OF MADISON, WISCONSIN, RICHARD WILLIAMS, CHRIS PAULSON, and PATRICK GRADY,

Madison, Wisconsin
December 12, 2005
8:06 a.m.

Defendants.

* *

TRANSCRIPT OF COURT TRIAL
HELD BEFORE THE HONORABLE JOHN C. SHABAZ

APPEARANCES:

For the Plaintiff:

Center for Inalienable Rights
BY: NATHAN W. KELLUM
BY: DAVID HACKER
2749 Lombardy Avenue
P.O. Box 11159
Memphis, TN 38111

For the Defendants:	Boardman, Suhr, Curry & Field BY: CATHERINE M. ROTTIER BY: MATTHEW WEBER P.O. Box 927 Madison, WI 53701-0927
Also Present:	Ralph Ovadal, Plaintiff Sergeant Chris Paulson, Defendant Sergeant Patrick Grady, Defendant
Court Recorder:	Ryan Plender 120 North Henry Street, Room 320 Madison, WI 53703
Transcription Service:	S-B Transcription Service 5212 East Lacy Road Madison, WI 53711

Proceedings recorded by electronic sound recording, transcript produced by certified transcription service.

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(Call to Order of the Court)

THE CLERK: Case No. 04-C-322-S, Ralph Ovadal versus the City of Madison, Wisconsin, called for a Court trial. May I have the appearances, please?

MR. KELLUM: For the plaintiff, Ralph Ovadal, Nate Kellum, and with me is David Hacker.

THE COURT: All right.

MS. ROTTIER: Defendants City of Madison, former Chief of Police Richard Williams, Sergeant Curt Paulson -- Chris Paulson and Sergeant Patrick Grady appear by their attorneys, Catherine Rottier and Matthew Weber of the Boardman law firm. Sergeant Grady and Sergeant Paulson are also here in person.

THE COURT: The Court would announce that Mr. Weber was a clerk in this court for two years. It's been

so long ago I can't remember him that well, but the fact is I do bring that to your attention. It's nice to see he's back in the practice of law. His association with the Court does not in any way affect its ability to remain fair and impartial.

The Court will accept those agreed statement of all uncontested facts set forth in the joint final pretrial conference report. It's also, although this is perhaps somewhat cumulative, provided to you at this time a statement of those uncontested facts which the Court believes are appropriate in this matter as well. At this time I will read

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it into the record.

Plaintiff Ralph Ovadal is a resident of Green County, Wisconsin. Defendant City of Madison is a Wisconsin corporation. Defendant Richard Williams was the Chief of Police for the City of Madison at all times material to this complaint. Defendants Chris Paulson and Patrick Grady were sergeants in the City of Madison Police Department.

Prior to September 2, 2003, plaintiff had displayed signs and banners on other pedestrian overpasses in the Madison area on at least six different occasions. On September 2, 2003 plaintiff and several other persons displayed signs and banners expressing their religious viewpoint on homosexuality on a pedestrian overpass located near the Verona Road exit on the Beltline highway in the City of Madison. The group displayed two bright yellow banners, each 16 feet long by two and three-quarters feet wide, bearing the words Homosexuality Is Sin. They also had two signs which stated Christ Can Set You Free and Repent. Madison police officers received several 911 reports and noticed that there was a distinct slowdown in traffic near the overpass.

The Beltline highway is a major thoroughfare and a limited access freeway with a 55 mile per hour speed limit. It contains three lanes of eastbound traffic and three lanes of

westbound traffic. Madison police officers instructed plaintiff and his group to leave the overpass or they would be
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arrested for disorderly conduct. The group departed without any arrest being made and citations issued.

On Saturday morning, October 11, 2003, plaintiff and several others held signs and banners on a pedestrian overpass near the Park Street exit. Sergeant Grady noticed a slowdown of Beltline traffic in the area of the demonstration. Sergeant Grady advised plaintiff that he would not be allowed to express his message on the pedestrian overpass. Sergeant Grady said, "And I guess my feeling is that you present a traffic hazard here. You've got people going 60, 70 miles an hour there and they're looking up and seeing you." Plaintiff and his group left the overpass because they reasonably believed if they did not, they would be arrested.

At all times material to this complaint the City of Madison had a policy to prohibit signs, banners and demonstrations on overpasses that cause a traffic hazard. On November 29, 2005 the Madison Common Council passed an ordinance banning signs and banners on Beltline overpasses.

The Court also has attached the stipulation as to average traffic speed and volume on the Beltline and has also read the proposed testimony offered in this matter by a witness who is apparently not available for trial.

The Court will hear those objections to the uncontested facts as read by the Court. From the plaintiff. Hearing none, Ms. Rottier, from the defendant.

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MS. ROTTIER: Your Honor, I have one concern and it is the third last paragraph of your proposed statement. It relates to the fact that the Court is finding as fact that at all times material the City of Madison had a policy to prohibit signs, banners and demonstrations on overpasses that cause a traffic hazard. I am well aware that

he Court is constrained by the Seventh Circuit's decision but I also want to be able to maintain the record, Your Honor, that the City has maintained that there was no official policy governing expressive activities on Beltline overpasses at the time of these events, and I need to make that point.

THE COURT: All right. Anything plaintiff wishes to state?

MR. KELLUM: Nothing further, Your Honor.

THE COURT: All right. I did have a great deal of trouble with the witness -- with the exhibits that have been provided, more than we usually receive, but I suppose it's because it's the party's first entrée into this matter.

First of all, looking at these tapes. The Court does understand that 1 and 2 which were previously offered are of very poor quality and are not being received. There is an unnumbered tape called Docket No. 63. We'll get to that later.

The Court has viewed plaintiff's what I would think are revised Exhibits 1 through 12 believing they're the same

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except 1 is in color and 9 has some difficulty in being received on the basis of relevance. But let me ask the plaintiff, what tapes are you offering in this jungle that you've created?

MR. KELLUM: First of all, I apologize to the Court for the jungle. We're offering both 1, 9 and 12 for the Court's consideration.

THE COURT: All right.

MR. KELLUM: And I'll -- if the Court would like me to elaborate.

THE COURT: No, I don't. Those are the ones you're adding; 1, 9 and 12.

MR. KELLUM: Yes.

THE COURT: Any objection?

MS. ROTTIER: Yes, Your Honor. I think that 12 might be admitted. One may need to be admitted to show

that in fact it's an edited tape, it was not what it was represented to be, and I need to have the opportunity to establish that. With regard to 9, there is real questions of relevance and authentication of what's on that fairly jumbled tape.

THE COURT: Yes, you're absolutely right. The Court believes that the new -- I think they're the new, maybe they're the old -- but these Plaintiff's Exhibits 1 and 12 will be received subject to that further argument which may be provided. I'll hear the argument -- Well, all exhibits are

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received subject to relevance in this court. So if the only objection as I understand it -- well, the reasonable objection is relevance to No. 9, that will also -- I guess that all three of them will be reserved I suppose is probably the best way of handling these things.

What other exhibits are you offering? Defendants have objected to the proposed Exhibits 4 and 5. What do you have to say on that?

MR. KELLUM: Those are withdrawn, Your Honor.

THE COURT: Those are withdrawn.

MR. KELLUM: Yes, Your Honor.

THE COURT: All right. And the original 1 and 2, they are withdrawn as well, are they, in lieu of the others that have been --

MR. KELLUM: Yes, Your Honor.

THE COURT: -- provided? Right? All right. Yes, you have withdrawn those. Defendants object to proposed Exhibit 6 as it's not relevant to any issue in this lawsuit. Any comments on that from the plaintiff? You talk about the direct knowledge of the chief about the unconstitutional policy and ban imposed on Ovadal and his desire for relief. Is that about what this is?

MR. KELLUM: That's the justification as I

understood the reply. I'm not sure there is an objection but I'll allow counsel to speak to that.

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THE COURT: Ms. Rottier.

MS. ROTTIER: Your Honor, in light of your stipulation on policy, I don't know that it's relevant at all but --

THE COURT: All right. The Court reserves. The failure of authentication and hearsay in Exhibits 7 to 9. You are going to have those authenticated at trial, is that your understanding?

MR. KELLUM: Yes, Your Honor.

THE COURT: And you still believe there's a hearsay objection?

MS. ROTTIER: There is hearsay on the videotape.

THE COURT: Right.

MS. ROTTIER: It's kind of a difficult thing because there's so much -- so many parts to it, Your Honor, but there are hearsay objections there.

THE COURT: And the hearsay of course will not be received if indeed that is the case. But I'm looking now, that's the Exhibit 9 is the one that we've previously talked about and the Court continues to reserve relating to that.

What other exhibits does the plaintiff have, if any, Counsel? You don't have to rise each time.

MR. KELLUM: Exhibit 8 which is an e-mail exchange.

THE COURT: I didn't see any objection to that.

MR. KELLUM: I don't think there was.

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THE COURT: I mean you -- and so I've received that without objection.

MR. KELLUM: So is -- I'm sorry, Your

Honor. Is your question are there any other --

THE COURT: Right.

MR. KELLUM: -- exhibits that are subject to objection to my --

THE COURT: Any objection. Any others being offered?

MR. KELLUM: There are others being offered.

THE COURT: But those are not objected to so they're received.

MR. KELLUM: That's my understanding. Yes, Your Honor.

THE COURT: They're all received subject to relevance, all right? Let's then look at the defendants' exhibits. Are there any continuing objections to the defendants' exhibits?

MR. KELLUM: Do I have any objections, Your Honor?

THE COURT: Yes.

MR. KELLUM: Yes, Your Honor. The only objection I have is to what I believe is Exhibit No. 208.

THE COURT: All right.

MR. KELLUM: That's the ordinance. It's my understanding from counsel's letter –

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THE COURT: You believe it's not relevant, the ordinance which was adopted on the 9th of -- what was it, the 29th of November?

MR. KELLUM: And I understand will not be effective until mid December. If the ordinance is not effective, I don't know what the relevance would be, Your Honor.

MS. ROTTIER: The relevance, Your Honor, is that one of the forms of relief that the plaintiff is seeking is injunctive relief.

THE COURT: I understand that and it's in

place thereof. Or you believe that that resolves that concern? Is that what you're telling me?

MS. ROTTIER: I believe, Your Honor, that you would have to be aware of the existence of the ordinance in determining whether or not the standards for injunctive relief were met.

THE COURT: Right. That's the current status that we'll be looking at. All right? I'll reserve.

All right, plaintiff, you may call your first witness.

MR. KELLUM: Thank you, Your Honor. We would call Ralph Ovadal.

THE COURT: All right.

RALPH OVADAL, PLAINTIFF, AFFIRMED

THE COURT: You may proceed.

DIRECT EXAMINATION

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BY MR. KELLUM:

Q Mr. Ovadal, if you could please state your full name.

A It's Ralph Nels Ovadal.

Q And where do you live, Mr. Ovadal?

A Monroe, Wisconsin.

Q And what line of business are you in?

A I'm a pastor of a church.

Q And a pastor of what religion?

A It's a Protestant religion.

Q Do you have the occasion to communicate your religious beliefs in public?

A I do. It's part of my ministry.

Q And could you elaborate on that? How is it part of your ministry?

A Well, as a pastor I feel that we're to go out into the world as Jesus said and share the gospel and to reprove the unfruitful works of darkness and just take the word of God out to the whole world and convince people, if we can, of the truth of it. And so we do a number of different ministries,

gospel preaching. We work on pro-life ministry and of course we deal with the homosexual issue as well.

Q And so where do you go to do these things?

A All of them or --

Q Yeah. As far as communicating your religious beliefs, where do you go?

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A We go out where we can find the most people to share -- to share our beliefs with.

Q And how do you communicate?

A Well, we preach. We hand out tracts. We also rely heavily on visual means such as signs and banners.

Q So why signs and banners?

A Because the Bible says faith cometh by hearing and hearing by the word of God. And we like to put words right on banners and share the message. Especially if it's a situation where maybe we can't go one-on-one or actually talk to them verbally, we'll put something on a sign. We feel it's the same thing really. It's words either way, so it's very effective to get it on a sign or a banner and just display it.

Q Do you have an occasion to utilize signs on pedestrian overpasses?

A We have.

Q And why is that? Why do you use pedestrian overpasses?

A Well, my personal belief is that it's a good place because I believe it's -- I mean, it's contested, but I believe it's a good and safe place for everyone involved and we reach a very wide range of people from these places because people are traveling here and there and from state to state, for instance in case of the overpasses in Madison, and we're just able to reach a great number of people, especially if it goes to some issue that's very relevant to our times, you know, such as

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homosexuality and very much discussed.

Q So which pedestrian overpasses do you like to use?
A Well, Madison is where we like -- where I like to go because I'm very busy as a pastor. There's other people in our church who have been to Milwaukee. I think I've been there once or twice. But Madison works for me because it's within about 45 minutes of my home and it's -- the overpass is over the Beltline, feature people from, you know, many different states and it's just, it works very well for me to go there and I think it's a great place to be.
Q So do you want to use pedestrian overpasses on both the Beltline and outside the Beltline in Madison?
A I have not been on overpasses other than the Beltline. That's -- I guess I can't -- I guess I've just zeroed in on the Beltline because it's just been such a unique place and it's so effective. I mean, basically I've only got so much time so I go for the place where I'm going to reach the most people and our target audience.
Q And what is your target audience?
A Target audience is the whole world. Jesus said go into the whole world, and so I try to reach as many people as I can from as many different backgrounds and areas of the state and the nation as possible.
Q Now besides pedestrian overpasses, have you tried to use any other means to communicate to that same audience?

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A Are you talking about the people who travel on the Beltline?
Q Yes.
A There's really no -- I've tried -- I tried billboards. It started a huge controversy. There were bright billboards, Homosexuality Is Sin, Homosexuality Is Not A Family Value, Homosexuality Is A Sin, and I put several of those up around Madison, specifically on the Beltline area where we do the overpasses. But it started a big controversy and once our time with the company was done --

MS. ROTTIER: Objection.

THE WITNESS: -- we couldn't get anymore.

MS. ROTTIER: It's a narrative answer.

THE COURT: Overruled. The answer will stand but we will be more cautionary in the future.

BY MR. KELLUM:

Q Are you finished, Mr. Ovadal?

A Well, I was just going to say that when we've tried to get a billboard -- this happened in, I don't know, I can't give you the exact year --

THE COURT: Sustained.

THE WITNESS: -- but the late '90s. And we --

THE COURT: Sustained as a narrative. He's continuing to narrate without a question.

BY MR. KELLUM:

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Q If you would just respond to the question. Have you tried to utilize billboards, Mr. Ovadal?

A Well, we have. We had them up once and we can't get them up again because the company won't let us have them due to controversy.

Q Why pedestrian overpasses as opposed to the side of the road?

A Well, on the Beltline, I mean as far as I've seen you can't get right alongside the road. It wouldn't -- you know, I don't think it would be safe, plus they have the fences and you'd be so far off the road no one could see you.

Q Now prior to September 2nd of 2003 have you ever attempted to use signs on pedestrian overpasses in Madison?

A Yes, I did.

Q And what happened during those times?

A Well, it went pretty well. We had contact with police on several occasions. I'm going from memory and also partially we've got some ministry reports, so I've tried to pull everything together just lately. But we had some contact with police. It went well. On one occasion some police said

they didn't think we could stay and we'd have to leave, and then a sergeant came and said, No, no, there's no problem, First Amendment and all. So it went well. It went pretty well. No problems.

Q Okay, I want to direct your attention to September 2nd,

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2003. Did you attempt to share your viewpoints that day?

A September 2nd, yeah. Yes.

Q And what was your message?

A Homosexuality Is Sin, Christ Can Set You Free, and we may have had another sign. I mean, since we were last in court it's been brought to my attention we may have had Repent Ye And Believe The Gospel up there on one of the signs on September 2nd.

Q And, so how did you plan to communicate? Was it with the use of signs, or you tell me?

A It was with these signs, exactly.

Q And if you would, describe these signs.

A The Homosexuality Is Sin sign is a banner.

THE COURT: That was in evidence?

MR. KELLUM: It certainly is.

THE COURT: Isn't that cumulative?

MR. KELLUM: I would agree, Your Honor.

THE COURT: Don't you believe the Court can see almost as well as it can hear?

MR. KELLUM: I would think so, Your Honor.

THE COURT: Well, but now it can.

BY MR. KELLUM:

Q Why enlarged lettering on the signs?

A So people can see them.

Q And which overpass that day?

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A The one -- September 2nd was, I don't know exactly what the overpass itself is called, but it's just past Verona Road on the Beltline.

Q And what time did you arrive on September 2nd? Do you recall?
A I don't recall the exact time, I really don't.
Q Okay. And did you have any interaction with the drivers of the vehicles that day?
A Do you mean as far as talking with them back and forth?
Q Yes.
A No. I mean I -- I'm not exactly sure what you mean. I said God Bless You a few times maybe. I don't -- I doubt if they heard me, but people hollered as us a few times and I wouldn't call it much interaction.
Q So what was the traffic like that day?
A Well, it varied. I mean it was typical traffic. This was in the afternoon and it was just typical for that time of day. I guess, I wouldn't call it light. It was, it was fairly heavy, yeah. I mean, it's normal for that time of day later in the afternoon.
Q Now at some point were you approached by Officer Fields?
A Was I?
Q Yes.
A Yes, I was.
Q And, if you would, describe what happened.

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Q . Well, Officer Fields was very polite. We talked for quite some time. He came and said first, If you don't have a permit you can't be up here. And then, I mean it's a long conversation but in essence it seemed like the gist of it was is that people -- he felt it was a safety issue because people, as he said, were disgruntled and were calling and were angry because of our message and he felt we should go, that we had to go. And then at some point -- let's see, I'm trying to remember -- he said you're going to have to go and then he said you can stay.

And then I think he was talking back and forth with

superior officers maybe, and then he said, Okay, that's it, you really have to go. And we started taking down and then he said, No, wait. He talked to someone. No, you can stay now. And then finally he said, Now you have to go. And so then we were ordered off under threat of arrest. We had quite a lengthy conversation in that time.

Q I understand. Was there ever any discussion about whether this restriction was a heckler's veto?

A I brought up the whole issue that I felt -- I mean, we were talking back and forth. He was explaining what he thought and he said things like, Well, if someone was -- what did he say -- bothering you, I can't remember exactly, annoying you or bothering you, I don't remember the exact word, wouldn't you want me to do something about that? And

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people are upset and so on and so forth. And I said, Well, that's called a heckler's veto. In other words, the problem lies with the person that's acting inappropriately. This is a response to our First Amendment speech and you can't silence it because people are getting upset. So that was kind of the gist of the, of the contention between us. And he was saying, Well, I'm just, you know, basically doing my job.

Q Did he provide you a justification as why you would have to leave?

A That he felt it was a safety issue due to the response of people going under us, you know. And he said there had been an accident down, down the Beltline somewhere, and of course we shared that we had never seen any accidents or near crashes or anything like that. And basically he came back to it's a safety issue based on how people are reacting to your message.

Q Were there any billboards in that area?

A Yeah, it's fairly littered with billboards.

Q Did you have any discussion with Officer Fields about the billboards?

A Yeah. There's a big, it's called a Hooter's Restaurant billboard with a young lady on it in a pretty provocative dress and pose and I pointed out that, you know, if you want to talk about distracting, that would be quite distracting too. And, you know, we talked about that.

Q So did Officer Fields let you stay or did he make you

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leave?

A Well, it was go, stay, go, stay, leave. And then we finally had to leave. I mean the final thing was, My sergeant's on the way and he says you have to get off right now. So we had to leave.

Q Did you have any discussion with Officer Fields when he returned back on the overpass?

A He returned the second time?

Q Yes.

A Yeah. Yeah.

Q And what do you recall about that?

A The first time -- now I've not, you know, poured over everything. I'm a pastor, I have many duties. I've looked at the tape once prior to the last hearing so I'm going a lot by recollection and I did review the transcript. But as I remember, the first time he came and he was pretty adamant we had to go. And then he said, Nope, it's fine, you can stay, you're good. And, you know, we exchanged pleasantries and he left. And the second time when he came back he said, Nope, that's it, you really have to go. And then as I said, we went back and forth on the whole idea of -- I mean I kept, I guess you could call it, harping on the issue that it seems like we only have to go because of people's response to us and, you know, that the problem lies with them if they're not acting appropriately, not with our First Amendment speech.

[23]

And we went back and forth on the safety issue and he was saying, Well, they're disgruntled and they're not, you know, they're angry or so on and so forth and you have to go.

And then as we were taking down our signs and banners, we both made it clear to each other this is nothing personal, this is just, you know, we're not -- we're not seeing eye to eye on this. And then he said, Nope, put them back up because the sergeant's coming.

Q And was there any discussion about near crashes?

A Yes, there was. He said that there were some people that had reported that they almost had accidents. And I asked him, well, I said, Well, we haven't seen any. You can ask any of these people, we haven't seen any. And I said, Have you seen any? And he said, No, I haven't seen any either. Not in those exact words but that's what he said.

Q Did Officer Fields inform whether or not any police officer had followed up with any of these folks who called in about a near crash?

A Well, that's the point I raised. I said, you know, we're -- these are anonymous caller citizens saying that, Well, I had a near crash because of that message. And I said, Don't you see how they might say that just to get us off? I said, We're all citizens here too and we haven't seen any. What about our testimony. And I asked, you know, who these people are and at that point, no. Now I don't know what the situation is today

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but at that point no, they said we don't but it's -- I don't have identities or anything. We're just getting reports.

Q So what happened next?

A Are you -- Next at what point? After all of this?

Q After you had the discussion with Officer Fields about whether or not you could stay, what happened?

A Well, eventually it ended by him saying he got word, he got a call. I mean as we were talking, calls were coming in and he was going back and forth I suppose with superior officers. And he said, That's it. You know, My sergeant's, I think he said at one point is stuck in traffic. He's on his way to talk to you but you have to get off now. It's done. You've got to go. And so we eventually did have to leave and then we waited for

the sergeant.

Q Did you ask Officer Fields if you could come back without signs?

A Yeah, there was a discussion about that. He was saying, Well, you have to go. And there was another situation going on with some other people on there too, and I said, Well, I'd like to wait and see how this comes out. And then they said, No, you have to go that way now. And I think -- I said something about what if we leave the signs, you know. And basically he said no, go. But then he did end up saying, Yeah, if the signs aren't here you could stay up here. So first it was sort of like you just got off here no matter if there's signs or not.

[25]

That's the best of my recollection. And then he said, No, you can stay as long as all the signs are gone. You can stay for a while and see what this other situation turns into.

Q So did you leave with your signs?

A We had all the signs. Yeah, we took all the signs off the bridge.

Q So why did you leave?

A Well, we left because I asked him, If we don't leave what happens. Well, you get a citation and you'd be -- of course, if you won't leave you'll be arrested and the signs will be taken. If you get a citation, you don't pay it, then you could be subject to, of course, arrest or warrant in jail.

Q And so what happened after you left the bridge?

A Well, we went down below and we had a number of people with us; a pastor from England and some other people who had come over for a meeting we were having, people from different countries, the United Kingdom essentially. And we stood down below and since there was a sergeant coming I wanted to talk to him and try to clarify this whole thing and see if we could straighten it out. And so we waited and we just made small talk.

Q So did you talk to the sergeant?

A The sergeant did then arrive.
Q Are you referring to Sergeant Paulson?
A Sergeant Paulson.

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Q And tell us about that conversation.
A Well, he made it clear that we couldn't go up on the bridge, had to stay off it. He said, you know, that people were upset with us and therefore he thought it was a safety issue because of the way they were upset, you know, they might act wrongly I suppose. We had a nice conversation. I mean we certainly didn't agree. I felt he was wrong, dead wrong. I felt he was very professional in the sense that he was very polite, very kind. We definitely had a disagreement on constitutional law and the bridge. And he made it very, very clear that people were upset, that made it a safety issue, we could not go up there. If we did go up there, we'd be subject to arrest.

I pressed home could we go anywhere on an overpass. Then I talked about, you know, where could we go, could we go on any overpass on the Beltline, and the answer as I remember was no. I said, What about anytime? What about any traffic situation? What about 2:00 in the morning? What about, and the answer was always no, not in this city. So -- because I wanted to clarify is there somewhere else that we could be. I mean same situation, same audience but maybe -- you know, I was just trying to find what is the policy here, what's going on, and I just couldn't really.
Q Was it discussed whether or not you had a right to walk on that bridge without a sign?

[27]

A Well, I did. At that point I said, Well, what if I went up -- and again I'm just paraphrasing. I'm going mostly by recollection. What if I went up on that bridge with an American flag was basically what I said. And he wasn't, you know, I wouldn't say he was wild about it but he ended up saying, Sure, you can take an American flag up there. And the point I was making is it seemed to me if I could take an

American flag up there fluttering in the breeze, a big American flag, that's also distracting. If the signs are distracting, that would be. So I guess the point I was trying to make is it seems to me this content-based based on the reaction of the motorists to my message. And so I did go up on the bridge and walked across it with a flag and back.

Q Did Paulson, Sergeant Paulson ever specify anytime on any pedestrian overpass in the City of Madison on which you could use a sign?

A My understanding was no overpasses.

Q Would this include the Beltline and other overpasses in the City of Madison?

A My understanding was -- I mean, we were zeroed in on the Beltline, but my understanding was and I said anywhere -- and my understanding was, whether I rightly or wrongly perceived it, was no, nowhere in Madison. Now maybe, you know, that needs clarification.

Q Did you try to go up the chain of command?

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A I did. Yes, I did, because I always -- if I'm involved in one of these issues, I feel like the police on the street sometimes get caught in the middle of things and so I like to go up the chain of command, get clarification. And so I asked for a higher officer, a lieutenant maybe or captain, but he said he was it. That he was, you know, basically it stopped there. He was in charge and I think he said something like there is no lieutenant or captain. And, I mean, I know he didn't mean there's none, but none available I suppose he meant.

Q So then did you leave the scene?

A Yes. After a fairly lengthy conversation we packed up and left.

Q Did you ever try to contact anyone higher in command with the Madison Police Department than Sergeant Paulson?

A I did. I called in to the police department. I called in to the City, I believe it was the police department. Yeah, it was the police department. And I asked -- I explained the situation,

the overpass, and I needed to talk to someone who could give me some sort of relief on this because I didn't -- you know, at that point we want to continue this effective ministry. We're not sure what's going to happen when, if ever, so I just felt I needed to push it. And I was told to e-mail this one e-mail address. It would be either Captain Davenport or Captain Silverwood. And so I did e-mail them.

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MR. KELLUM: Your Honor, that would be Exhibit 8 and I can proceed how the Court would like me to. If you want me to -- I don't think there's been any objection. Would you want me to just enter it at this time or it's already entered into evidence, or how would the Court want me to proceed?

THE COURT: Well, you don't read it in. You provide the authentication for it if that's what you think you've done. It says it.

MR. KELLUM: Sure.

BY MR. KELLUM:

Q So what was --

THE COURT: It's presently before the Court, as I understand it, without objection.

MR. KELLUM: That's my understanding --

THE COURT: It's here.

MR. KELLUM: -- as well.

THE COURT: It's here. It's done.

MR. KELLUM: Well, I will leave --

THE COURT: It's over.

MR. KELLUM: I will leave it alone then.

THE COURT: I'll pack my bags and go home with it, all right?

MR. KELLUM: Yes, Your Honor.

BY MR. KELLUM:

Q So what was the purpose of the e-mail, Mr. Ovadal?

[30]

A The purpose of the e-mail was to find out if I'm going

to be arrested if I go back up on those overpasses because we wanted to go back up on them. And it seemed to me at that point, obviously by two different officers' mouths, that we were going to be arrested if we were up on these overpasses. And so I just explained briefly what had happened and just tried to find out what was going on.

Q Did you ever get a response from the city attorney or anyone else affiliated with the Madison Police Department?

A My understanding was that they had kicked that up to the city attorney and I'd get a response, but I never got a response.

Q All right, let's talk about the incident on October 11, 2003. Where did you go on that day?

A What's that?

Q Where did you go on October 11, 2003?

A I went to an overpass near the Park Street entrance on the Beltline.

Q Okay. Considering what happened to you on September 2nd, why did you go back to a pedestrian overpass?

A Because I thought it was the Town of Madison and it turns out wrongly thought. We had been up there before and it was the Town of Madison so I thought I can reach the same audience, not have this clash with the City of Madison police and, you know, accomplish what I want to accomplish, because

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we had been up there before and no problem.

Q Describe your expressive activity that day. What were you doing?

A I mean I should correct myself. When I say no problem, we actually ended up having to have a federal court thing, but it straightened itself out and then we were safe.

We went up with the banners and signs again that we've just, you know, we've talked about and we did the same thing. We faced a banner and a sign one direction and

we faced a banner and a sign the other direction to reach traffic going both ways, and then we just stood there.

Q Did you notice any near crashes that day?

A I didn't.

Q Did you notice any cars slowing down?

A To my -- I don't remember the traffic slowing down. It was a Saturday morning and it was fairly -- for the Beltline it was pretty light traffic.

Q So what time Saturday morning was it?

A I think it was around midmorning. I'd have to get the time off of something else.

Q Okay, so what happened while you were out there?

A Well, things -- we had no problem with traffic or anything like that. We weren't out there too long. An officer came, Officer -- or Sergeant Grady and told us we couldn't be up there.

[32]

Q Okay, and what did Sergeant Grady tell you?

A He said that people -- I'm just trying to think back. No, Sergeant Grady said that he felt it was not a place that we should be. He seemed to be concerned again about just us not being up there. He thought it would be better if we weren't. And basically we had a long talk about I had told him with Sergeant Paulson and I told him that I thought this was Town of Madison. He said no, because they've switched jurisdictions now. So we kind of went through the thing briefly about, well, I have a constitutional right, so on and so forth. I wanted to make him aware of all that.

And he said, well, you know, I'm asking you to leave. And then -- eventually it came down to, Okay, clarify it. If we don't leave, then we'd be cited and what would happen. And we went through the whole thing. We'd be arrested and possibly, of course, if you don't pay your fine you're going to be jailed, there'd be a warrant out at least. And if you stay we may have to confiscate the signs, of course, and arrest you. So I said, Well, we're leaving then because we're not

going to go to jail over this. We're going to go to court instead and try to solve it there if we have to. And I made it clear to all these officers we don't want to go to court. We won't want to go to federal court. We'd rather just be able to exercise our constitutional liberties.

Q Did you have any discussion with Sergeant Grady about

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whether or not it was the same situation as dealt with Sergeant Paulson?

A Yeah, I brought up Sergeant Paulson and basically -- I said what had happened there and how we thought -- you know, we were trying to get a clarification from the City and until we got some kind of understanding and until we got the way cleared we were -- we came to Town of Madison because we wanted to be able to get our message out and we thought we could do it in the Town of Madison.

Q So did Sergeant Grady order you to leave?

A He did. He -- He encouraged us to if you have questions, you know, here's where the police station is. You can go. You know, the captain will be there during the weekdays. You know, you could take it up the chain of command. It seemed as if he was doing, you know, just doing his job, what he was supposed to be doing I guess. He was very -- very polite, very pleasant and basically, you know, it seemed like he was saying, Well, this is what I'm supposed to do, this is what I have to do, nothing personal, and of course I knew it wasn't. And so he did what he had to do and that meant we had to leave.

Q Did he mention an alternative, either another pedestrian overpass or similar other place where you could speak?

A He talked about a road called, I think it was Greenway Cross and said that would be a place that we could go

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essentially.

Q Did he mention any other pedestrian overpass where you could speak?
A No. I don't believe he did.
Q Is Greenway Cross a suitable alternative for you?
A Well, it's a different audience. I mean I've been -- I believe I've been on that road. But if it's the one I'm thinking of, it gets -- it's a different audience and you get a little raucous there we found out, because you're right on the street level with people, of course. I don't think it's a suitable alternative. I think it's a place a person could express a message but it's not, it's not where we want to be because we're not going to reach the audience we're trying to reach, I mean the exact audience we want to reach.
Q Were there any other attempts, through counsel or otherwise, to talk to anybody else further with the City of Madison?
A Did I have any other opportunities?
Q No, any other attempt. Did you try to talk --
A Oh, oh.
Q -- to anybody else with the City of Madison?
A Of course at some point obviously I talked to you and provided all of the thing -- videotapes and various things we had to you, talked it over. And then since I had gotten no response from the City at all, then you wrote a letter that we

[35]

talked about and you sent a letter to them trying to elicit a response and clarification.

MR. KELLUM: Your Honor, that would be Exhibit No. 6.

BY MR. KELLUM:
Q Mr. Ovadal, did the Chief of Police ever respond?
A No.
Q Since that time did you ever go to any other pedestrian overpass in the Madison area?
A Yes.
Q And where was that?

A On November 8th of the same year we decided, all right, we're going to take one more shot at this and we went to what I thought, and it turns out mistakenly I guess, was Town of Monona because I thought, well, here's a different jurisdiction, maybe we can -- I mean, it's a different, you know, it's a little bit different audience. It's a different -- I think it's north-south if I'm not mistaken. But we tried -- we decided to try that.

Q And what happened when you did that?

A Well, I think a man officer came and then a woman sergeant came. We had about a two-minute conversation with her. She said, No, you're good to go. She said things like, Well, people looking at these signs are no different than people looking at road signs, and she said -- and I can't quote verbatim, but something to the effect of people that are

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complaining are obviously upset, just upset with the message and that's why they're complaining. And then that was the end of that. And I did share with her I thought I was in Monona and they shared with me you're not in Monona. So I suppose I wasn't.

Q Mr. Ovadal, do you still have a desire to use signs and banners on pedestrian overpasses in the City of Madison?

A I do.

Q And does the include the Beltline pedestrian overpasses?

A Especially the Beltline.

Q Does this also include other pedestrian overpasses in the City of Madison?

A I guess I haven't really thought about the other overpasses that much. Obviously, I guess if we're pushed off the Beltline that would be a definite possibility if we could go there. But again, the Beltline is the audience we want to reach. It's -- you know, I'm a busy pastor. I have so much time to do ministry and I want to reach the people that I want to reach, the broadest spectrum of people when I am out

there.

Q So since going to the Town of Monona in November of 2003 have you attempted to use signs on any other pedestrian overpass in the Madison area?

A No, I haven't.

Q And why not?

A Well, because we've got two incidents where we've been

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threatened with arrests and, if necessary, confiscation of our signs if we don't leave. We have one where they say no, you're good to go. And I'd just like this whole thing straightened out to know where I can go and where I don't want to go because -- I just want the policy because I'm not into fighting with police officers and all of this sort of thing, operating under threat of arrest and bringing people out from various churches and getting into these situations. So I'd like to be able to go out without that sort of uncertainty. And it just seems arbitrary and capricious, you know, to operate under that sort of situation.

Q Mr. Ovadal, we have entered into evidence two videotapes, Exhibit No. 1 and Exhibit No. 12. Could you explain why there are two different videotapes, two versions?

A Well, I assume this is the first incident, September 2nd we're talking about.

Q I'm sorry. They both include September 2nd and October 11.

A All right. When this happened -- and again I'm going by the best to my recollection. This isn't what I do for a living. I'm not always involved in, you know, thinking about this. I sent -- we talked and I sent two videotapes to you. I sent one with the whole incident and one with what we had talked about as sort of the constitutional issues involved. Now the one has a boy, a man I think it was on a bicycle and

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some other things and the flag incident, and the other one was sort of the meat of the whole thing. So I sent both of them to you so you could look at the one, you know, and see what the issues were and then have the other one for the whole incident, because we just left the camera run for the most part, you know, on the whole incident.

Q Now there's also been a transcript of both events, the September 2nd event and the October 11 event. They've been marked as Exhibits No. 10 and 11. Have you viewed those?

A The transcripts I actually read last night.

Q Okay. Do they seem to be accurate and complete, or what's your thoughts on that?

A They seem to be accurate to me. I mean, there's a couple places where like I said in one place it says I said constitutional instrument and I think it was -- it was not instrument, it some other word I used there. But just little things like that. Otherwise, they seemed pretty good except the first one is from the abbreviated video.

Q So you refer to Exhibit No. 10.

A When I -- Yeah. When I read it last night I knew that was from the abbreviated, if you want to call it, video.

Q Okay.

A So otherwise, yeah, they seem accurate.

Q Okay. Describe how this ban on your speech has impacted you and your ministry.

[39]

A Well, it's impacted us in a number of ways. We're not reaching -- on this one issue. And we're not reaching people that we want to reach on this one issue. I mean, we've been deprived of a venue where we can be very, very, I think -- of course, like everyone else I want to be as effective as I can with my time and to have that venue is where I can get this message out to a large number of people, cross section of society, people from other states in the time I have.

We also have a man in our church who is involved in

ministry work and basically a full-time Christian worker and he really has zeroed in on this issue and it really has curtailed somewhat what he does because he has a real burden to get the truth out on homosexuality including the gospel to the homosexuals which of course is Christ can set you free. And so he's been deprived of that and that has hurt our ministry overall in our church, and of course the people that support him in his work. And then of course it's deprived me as a busy pastor involved in a number of things being able to be as effective as I would be and reach my target audience when I do go out on that issue. So I think it's had a fairly profound effect.

MR. KELLUM: That's all I have for now.
THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. ROTTIER:

[40]

Q Mr. Ovadal, let's talk first about the activities of you and your group on September 2nd, 2003. That was the Tuesday after Labor Day, correct?
A Yeah, I believe so.
Q And you and your group, I think you said you didn't remember the specific time, but you went up on that Beltline overpass near the beginning of rush hour on the Beltline, isn't that right?
A Yeah, it was later in the afternoon, so it would have been I think.
Q It was about four o'clock, wasn't it?
A Okay. I think so. Somewhere around there.
Q And the particular overpass was the one that's located between the exits for Seminole Highway and Verona Road, correct?
A I'm sure it was, yes.
Q The Beltline in that area where that overpass is

spanning is a particularly dangerous area of Beltline traffic, isn't it?

A Well, I don't know if I'm qualified to comment on that. There's a lot of traffic there.

Q Since the preliminary injunction hearing back in July of 2004 did you ever travel the Beltline to see if in fact people who are westbound in the far right-hand lane of traffic on the Beltline near Seminole can suddenly find themselves in the

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exit lane for Verona if their attention is diverted at all?

A I've never traveled it with that specific purpose. No, I've traveled the Beltline but I've never thought --

Q Okay. You've answered. You haven't gone back --

A Okay.

Q -- and looked to see for yourself whether that's a particularly dangerous stretch of the Beltline, have you?

A I've never traveled with that thought in mind specifically.

Q That's fine. Would you agree with me, Mr. Ovadal, that traffic on the Beltline, unless it's impaired for one reason or another, typically travels at highway speed or faster?

A I would say so.

Q I'll ask you to assume, Mr. Ovadal, because you don't know of your own knowledge, that in fact in that area traffic in the far westbound lane has to move over in order to continue as through traffic or it's going to be on the exit lane for Verona Road. Assuming that I've accurately described that, would you agree with me that that layout in and of itself creates a danger for drivers being distracted on the roadway?

A Well, it's never distracted me. I mean I suppose if you're not --

Q But, sir, you weren't aware of it, right?

A Oh, I'm aware you have to move over to exit. I know that, but I guess it's never distracted me.

[42]

Q Have you done any investigation since this lawsuit began to determine whether that particular area that you chose for your expressive activities that day is a stretch of a Beltline that is one of the most frequent sites of accidents?
A No, I haven't done any investigation into statistics.
Q Okay. Let's talk about the parameters of the expressive activities in which you engaged on that day, September 2nd, 2003, during rush hour. Your group consisted of you and about 10 other people, is that right?
A I think that's what it is, about 10.
Q Okay. In an earlier affidavit you said the number was six. That's incorrect, isn't it?
A I think I said nine and -- did I say six?
Q Yes.
A You know, I'm going by recollection. Then we went back into our ministry reports and tried to, you know, see who was there and who wasn't. So there's -- I mean I apologize for any variation but I believe it is about 10 altogether.
Q Okay. So with you there's about 11 people who were up on this overpass?
A No, I think it was 10 counting me. I'm not positive.
Q Ten counting you?
A I think so.
Q Would you consider yourself or describe yourself, Mr. Ovadal, as the leader or the spokesperson for this group?
[43]
A Oh, definitely. I was the pastor leading it.
Q Okay. And your group had a number of banners and posters to help convey the group's message, correct?
A That's right.
Q And I know the Court has already established what, the number of banners was two?
A Um-hum.
Q The size of the banners 16 feet each?
A Yeah, 16 feet by maybe 2 feet.

Q Three feet?
A Maybe three, maybe, you know.
Q And bright yellow?
A They're yellow with black lettering.
Q And in addition to that, two signs that maybe said Christ Can Set You Free?
A Yes.
Q Another sign that said Repent Ye?
A No, we -- I guess a discrepancy here and it would be my fault, but I think it says -- there may have been Homosexuality Is Sin and then just the other sign would have said Christ Can Set You Free possibly.
Q And then a large American flag?
A Yeah, the flag was up there.
Q All right. These banners if they're 16 feet long, are they being held with one person on one end and one person on

[44]

the other end and one person in the middle?
A I know there would have been more. With 10 people and you've only got two banners and two signs, so probably several people in the middle.
Q All right.
A I can't tell you exactly how many unless we review the video.
Q One being displayed to eastbound traffic and one being displayed to westbound traffic?
A Correct.
Q Mr. Ovadal, the number of people involved in the activity that day together with the number and the size of the signs, banners and flags was sufficient to create a spectacle on the Beltline overpass, wasn't it?
A Can you define spectacle for me, please?
Q Sure. Something that's out of the ordinary and causes a person coming [illegible] to look up with sort of a startled reflex. What's that?

A I don't know if it would cause anyone to be startled.
Q So now let's go back to my --
A Let me put it this way. It would be out of the ordinary.
Q Sure.
A I mean, you know, it would be something different.
Q And it would be a spectacle. It would be something you wouldn't expect to see, so seeing it would be out of the

[45]

ordinary?
A Yes, it would be out of the ordinary.
Q All right. This spectacle, this group of banners, people, flags or flag, singular, and signs, this was something that you anticipated that people driving on the Beltline would look up to see. That was the whole purpose of the demonstration, correct?
A Well, as far as looking up --
Q Could you just --
A I mean it's been my contention that --
Q Sir, could you just --
A -- they really don't have to look up.

THE COURT: Why don't you just --

MS. ROTTIER: That was just a yes or no question.

THE COURT: He won't, so why don't you just move to delete as nonresponsive.

MS. ROTTIER: Move to strike as nonresponsive.

THE COURT: Sustained.

BY MS. ROTTIER:
Q The purpose of having all the people, the banners, the signs --
A Um-hum.
Q -- the flag was to have people look at your message, right?
A Right. Right.

[46]

Q Okay. So they were going to look up to do that, correct?

A They were going to look at us.

Q All right. Do you acknowledge, Mr. Ovadal, that when a spectacle, something out of the ordinary is created, there can be a startle factor that develops in response?

A When -- Are you talking about this specific incident?

Q I'm just asking you in general right now. When there is something out of the ordinary, a spectacle, one response is to be startled by it and to kind of shake your head and say what's that?

A You know, I suppose -- I mean I'm not exactly sure what you mean. I mean startled by --

Q I think --

A -- us or startled by --

Q No.

A Because people are seeing this from way back when they see it.

Q Startled by the existence of the display.

A I think there's probably surprise because, you know, here's something they haven't seen maybe before.

Q Right, and so they would be surprised and drivers might think to themself what's going on here. That would be a normal reaction, wouldn't it?

A Thousands of people saw it. I don't know. I can't get in their heads what exactly they'd think.

[47]

Q Okay.

A I can tell you what I would think.

Q That isn't the question, sir.

A Okay.

Q It would be a natural reaction of Beltline drivers approaching your position today, that day, to slow down abruptly to get a better look at what this spectacle consisted of, isn't that true?

A Apparently not because I didn't see people doing that.
Q All right, you didn't see that.
A No, people just went, pfft, straight under the bridge.
Q And --
A Maybe a few slowed down.
Q Let's just assume that there were some Beltline drivers that did slow down precipitously approaching this spectacle of the demonstration. Just as a matter of natural fact, the heavy traffic behind those motorists would have to slow down in order to avoid rear-ending the cars ahead of them, correct?
A So you're saying if something happened that didn't happen but it did happen then that's what would happen, and I guess I could agree with that.
Q Let me ask it as a hypothetical. I'm going to ask you to assume, Mr. Ovadal --
A Okay, hypothetical.
Q Mr. Ovadal, assume –

[48]

A Okay.
Q -- that there are some drivers who did slow down precipitously as they approached that spectacle on the Beltline. If that happened -- and you don't have to believe it. I'm just asking --
A Okay.
Q - you to assume it. If that happened, the drivers behind them are going to have to slow down or they're going rear-end the vehicle ahead of them, right?
A Or go around, correct.
Q And that's dangerous in rush hour traffic, isn't it?
A If it really happened I suppose it could be.
Q And I think you described to your attorney on direct examination that the level of traffic at this time was heavy, wasn't it?
A It was moderate to heavy, yeah, like rush hour is.
Q Do you concede, Mr. Ovadal, that if you were the

motorist who hadn't even seen your signs yet but had to stop because the cars ahead of you had slowed down to gawk up and see what was going on, you might be ticked off without knowing one thing about your message?

A If someone was going 65 and slammed on the brakes and I had to stop, I guess I would be a little upset with them.

Q All right. You would concede, would you not, Mr. Ovadal, that people could get upset because they made the decision to

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take the Beltline home and now it's all jammed up and they can't pick up their kids from daycare on time or they can't get home on time or they're going to miss their next -- they're going to be late for their next appointment. All of those things are possible reasons why people could be upset at this circumstance without caring one iota about your message, true?

A So we're still dealing with the hypothetical.

Q Sure. If you want to treat it that way, that's fine.

A Because it was clear --

Q Assume that there are some drivers --

A Okay.

Q -- who slowed down to gawk and --

A Because it was clear to us it was --

Q -- the following drivers had to respond.

A There were things like F-U you, you know --

Q Um-hum.

A -- homophobe and things like that. But I guess, yes. I mean the question is getting a little convoluted I think.

Q You've answered it.

A Yes. Yes.

Q Do you acknowledge, Mr. Ovadal, that motorists who might have had no opinion one way or another about your message could still have thought it was something of a boneheaded idea for anybody to set up a spectacle of a demonstration on a

[50]

dangerous stretch of the Beltline during rush hour?

A No, because I have no idea to know --

Q You've answered.

A -- what people are thinking in their cars.

MS. ROTTIER: Answered, Your Honor.

THE COURT: The answer is no as I understand it.

MS. ROTTIER: Yes.

BY MS. ROTTIER:

Q Let's talk about your interaction with Officer Fields on that day, September 2, 2003. According to the videotape, and I think you said you have reviewed the videotape recently, is that right?

A No, actually I looked at the transcript. I reviewed the videotape once way back before the last hearing.

Q All right. Well, according to the videotape it appears Officer Fields first approached you and your group at 4:42 p.m. with the little timer --

A Okay.

Q -- that's on the videotape. Does that sound about right?

A If you say so, if you watched it. I'm sorry, but probably yeah. I mean, you know, we're in that period of time, so certainly I would think probably so.

Q He told you that there had been calls to dispatch about traffic safety issues that the callers attributed to your protest, didn't he?

A He said there had been calls, yes.

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Q And he asked you to move your protest elsewhere in the interest of public safety, didn't he?

A Yes, that was his theme.

Q He never asked you to stop protesting entirely, only to move your protest to a less hazardous place. Isn't that right?

A Off of the overpass and somewhere else but not the

Beltline.

Q Officer Fields appealed to you, didn't he, to cooperate with him in the interests of the greater good of protecting public safety?

A Yes, he said things like that.

Q In response did you tell him you had First Amendment rights to be up on that overpass protesting?

A Yeah, I said I didn't think there was a safety issue and, yes, I thought I had a right to be there.

Q You let him know you were not going to leave voluntarily, true?

A I let him know that -- He first said I'm asking you to leave and I said, Well, are you ordering us to leave, if I remember this right, because there's a difference, you know.

Q Sure. And --

A And if you're just asking, I felt we were right to be there and there was no safety issue. So if he's ordering, I'd

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obey.

Q So go back to my question.

A Um-hum.

Q You let him know that you weren't going to leave voluntarily, true?

A Yes.

Q At that point Officer Fields contacted his sergeant to report the situation and try to get some direction on how he should handle it, is that correct?

A I assume that's what he did. He was talking on his radio.

Q You saw him talking on the --

A Right, right.

Q -- police radio? In fact, you could overhear some of the conversation on the police radio?

A I could overhear some of it.

Q After talking with his sergeant by police radio, Officer Fields reported to you that you could stay, is that correct?

A Right.
Q And at that point Officer Fields and the other two officers with him left the overpass, is that true?
A Correct.
Q Okay. The first interaction with Officer Fields lasted eight minutes according to the videotape timer. Does that sound about right to you?
A Sounds about right.

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Q Now when Officer Fields checked with his sergeant and told you at the end of the eight-minute interaction that the protest could continue, there was clearly no established City policy saying you could not protest on Beltline overpasses, true?

MR. KELLUM: Object to form. First of all, it's an uncontested fact, Your Honor, and so I'm not sure that --

THE COURT: I don't --

MR. KELLUM: -- the purpose --

THE COURT: Just state an objection without argument. Can you do that?

MR. KELLUM: Certainly. Objection; that's an uncontested fact in the record. Objection; irrelevant.

THE COURT: Sustained. Although there has been made that clarification when we began.

BY MS. ROTTIER:
Q Officer Fields returned to the overpass site, the site of the demonstration 30 minutes, a half hour later after he first departed. True?
A To the best of my knowledge, yes.
Q That was about 5:20 p.m. according to the videotape. Does that seem right to you?
A If that's the time on the videotape. I'm just thinking that that videotape might have had -- might have been an hour ahead on the time. I'm sorry to bring that up but –

[54]

Q There --
A -- that's the time on the videotape.
Q There is a different videotape where we've got time problems --
A Okay. Okay.
Q -- but I don't think it's this one.
A All right. Then, correct.
Q Okay. And at the point that he returned after having been gone from the overpass for a half hour, he told you he had been ordered to return because the police had received even more reports of motorists saying they had been in near collisions, correct?
A I think he did mention, yes, there were calls.
Q Near collisions being reported to the police are something the police have to deal with. Would you agree with that?
A I would agree.
Q Okay. You asked him, did you not, Mr. Ovadal, if he had personally seen near collisions on the Beltline and he said he hadn't been up on the Beltline --
A Um-hum.
Q -- for the last half hour, so naturally he hasn't seen any. Isn't that true?
A He didn't tell me where all he had been. He just said he hadn't seen any.
Q But you know he had left, right?

[55]

A I don't know where he went.
Q You knew he was gone for a half hour.
A Right. I don't know where he was, if he was down the road or where.
Q So when Officer Fields told you he hadn't seen any himself, a fact that you put in your affidavit --
A Um-hum.
Q -- he wasn't agreeing there hadn't been any, he was saying he hadn't been in a position to see any.

A I assume that's correct.
Q When you asked him why there was a change in directive from being allowed to stay to now being ordered to disperse and Officer Fields told you about the two reports of near crashes, did you say in response, Well, that happens all the time, near crashes on the Beltline?
A What I said is, the context is that people will make -- take that and then use as excuse to push us off is the whole context of --
Q No --
A -- the discussion. I didn't say I didn't say that, ma'am. But the point was –

[56]

MS. ROTTIER: Move to strike as nonresponsive.

THE COURT: It isn't --

THE WITNESS: -- that people were using that excuse.

THE COURT: It isn't in yet. Now.

MS. ROTTIER: Move to strike as nonresponsive.

THE COURT: Sustained.

BY MS. ROTTIER:
Q Do you -- I think you told me, Mr. Ovadal, that you did look at the transcript that --
A I did.
Q -- a court reporter tried to prepare from the videotape?
A Um-hum.
Q Yes?
A Yes, I looked at the transcript.
Q And you understand it's difficult. Sometimes there are words that can't be heard, there's traffic noises, so the court reporter did the best she could in trying to type out the words that could be heard?
A Oh, yeah. The traffic noise was bad.
Q And from having reviewed the transcript can you

confirm that in fact in response to Officer Fields telling you of reports of two more near crashes you said, Well, that happens all the time, near crashes on the Beltline?
A I -- I probably did. I mean, I'm just objecting to the context, take out of context.
Q And you also were querying Officer Fields, Well, who are these people? Who's calling? Who said they --
A Um-hum.
Q -- were in a near crash? Give me their names and

[57]

addresses, didn't you?
A Yeah. Not in those exact words, but yeah, I did. I wanted --
Q Of course he didn't have that information --
A Um-hum.
Q -- at that time. You knew that, didn't you?
A No, I didn't, because police usually say what is your name.
Q All right. You would think that Officer Fields having been ordered back to the scene would have with him the names of the people who had been calling in to dispatch?
A No, I didn't expect him to have them with him. I just -- I was trying to make a point that he's got anonymous calls, and we had never seen a near crash where we were.
Q Mr. Ovadal, do you recall that in connection with this case you submitted a long affidavit called the Second Affidavit of Ralph Ovadal?
A Yes.
Q And when you submitted that affidavit you knew you were signing it under oath?
A I knew I signed it under oath.

MS. ROTTIER: Your Honor, I would -- I'm going to hand a copy of it to Mr. Ovadal. Is that acceptable?

THE COURT: And that's -- do you have a docketed number on that?

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MS. ROTTIER: You know, Your Honor, I don't but I have an extra copy for you.

THE COURT: All right.

THE WITNESS: Thank you.

BY MS. ROTTIER:

Q This affidavit, if you look at the back of it, is dated September 21 of 19 -- or 2004, is that right?

A The very last page here?

Q Yes.

A September 2000 -- Yeah, yeah, 21 -- Okay.

Q And if you would look at paragraphs 29 and 32 of that affidavit.

A Okay, I'm on 29.

Q All right. In paragraph 29 you're stating under oath --

A Um-hum.

Q -- that Officer Fields explained that he had been instructed to remove us from the bridge. He mentioned that there were some reports of near accidents and they had received several complaints about our message. Do you see that?

A Yeah.

Q And then if you look at No. 32 it says, Officer Fields said that our conduct amounted to disorderly conduct. Elaborating further, Officer Fields indicated that it was disorderly conduct because individuals were disturbed by my

[59]

message and Officer Fields confirmed that we would be cited for disorderly conduct. Do you see that?

A I see that.

Q Now the words "disturbed by your message," those never came out of the mouth of Officer Fields, did they?

A Maybe it was disgruntled.

Q Right. He never -- and people can be disgruntled for a million and one reasons.

A Um-hum.

Q Would you agree with that?

A Oh, I think so. Um-hum.
Q He never said that people were disturbed by your message, did he?
A I don't think he did. I think he said disgruntled.
Q Okay. So putting it in -- putting in your affidavit that he said it was the message, that's not correct, isn't it?
A Well, some -- we were working back and forth with attorneys and I didn't review the videotape and I don't -- I --
Q But you --
A To the best of my knowledge, disturbed wasn't said.
Q Disturbed may have been said. Disgruntled may have been said.
A Oh, I'm sorry.
Q People upset may have been said.
A Um-hum.

[60]

Q But tying it to your message, that was not said.
A Well, if it wasn't then I would say I made an error. It was to the best of my knowledge as I looked this over after it was given to me.
Q Regardless of the source of the disturbance, whether it was motorists upset by your message or motorists upset that they got caught in a horrendous traffic jam and they were going to be late for their next appointment --
A Um-hum.
Q And they were annoyed at what they perceived to be the source of this disruption, no matter what reason for the disturbance the police had to deal with it, didn't they?
A Yeah, they did.
Q It wouldn't be appropriate for the police to simply wash their hands of the situation if they were getting multiple calls to dispatch about safety concerns and reports of near collisions on the Beltline during rush hour?
A No. The one side was all jammed up. The other side was moving freely, so --
Q Officer Fields when he talked to you and Sergeant

Paulson later that day when he got to the scene, they both stressed to you that their concern was solely to protect the public safety and not to squelch your message. Is that true?

A They remarked that a number of times.

Q Sergeant Paulson, when he finally arrived at the scene

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after getting through the traffic jam himself, even suggested that the Madison Police Department might be able to facilitate your demonstration at a safer location, true?

A He said there could be other places.

Q Both of them, Officer Fields and Sergeant Paulson, told you repeatedly that their reaction to the situation was not content-based, correct?

A When I brought it up -- when I specifically brought it up, yes, if I pressed it.

Q Would you go to paragraph 33 of your affidavit, please, Mr. Ovadal?

A Sure. Okay.

Q It says that at approximately 5:30 p.m. pursuant to Officer Fields' instructions we were preparing to leave. Then Officer Fields received a radio call advising him to allow us to remain on the bridge until Sergeant Paulson could make it to the scene and he advised us accordingly. Did I read that correctly?

A Yes.

Q Would you agree then, Mr. Ovadal, that as of that point, 5:30 p.m. on September 2, 2003, the City of Madison did not have any established policy prohibiting your expressive activity on Beltline overpasses?

A No.

MR. KELLUM: Objection; irrelevant.

THE COURT: Overruled.

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THE WITNESS: No.

BY MS. ROTTIER:

Q You don't agree?
A I have no knowledge --
Q All right, that's fine.
A -- of what it was.
Q At this point, around the 5:30 mark --
A Um-hum.
Q Sergeant Paulson was trying to get to the scene. You knew that.
A I'm sorry. To get to the scene?
Q He was trying to get there.
A Correct. Correct, yes.
Q And he was also trying to get input from the District Attorney's Office's, correct?
A I believe he was, yeah.
Q Officer Fields had told you that Sergeant Paulson was contacting the DA, correct?
A I want to direct your attention now to paragraph 34 of your affidavit. It says: I asked Officer Fields if he really thought our expressive activity was distracting to drivers. In response, Officer Fields stated, quote, I mean, I really don't. It doesn't distract me. Did I read it correctly?
A You did.

[63]

Q That's not an accurate characterization of what Officer Fields said, is it?
A Nope. That's a mistake.
Q Isn't it the case, Mr. Ovadal, that Officer Fields said those words after you pointed out the Hooter's billboard to him?
A That's exactly correct.
Q So this section, this paragraph in your affidavit is misleading. He didn't say that your -- he wasn't referring to your signs when he said they didn't distract, he said the Hooter's billboard didn't distract him.
A Yeah, it's inaccurate. Between me and the attorneys long-distance it -- I should have watched the video again

before I signed this thing instead of just going by memory.

Q In fact, after that discussion about the Hooter's billboard Officer Fields told you that he himself had been in the traffic slowdown and he had concluded himself that it was caused by the spectacle of your demonstration, isn't that true?

A I think he did. I don't remember the exact words but I think you're in the ballpark.

Q When Sergeant Paulson continued to have trouble getting through the snarled traffic to reach the scene, Officer Fields finally ordered you off the bridge at about 5:46 according to the videotape. Does that sound about right?

A Probably, yes.

[64]

Q And that was under threat of citation for disorderly conduct, true?

A Right.

Q By the time you got the final order to disperse, a counter-protest had developed on the overpass, is that right?

A Right, there were several people.

Q It was important to you and your followers to make sure that the counter-protestors were ordered to leave if you were ordered to leave, true?

A True.

Q And in fact you wanted to stay and see that happen?

A Right.

Q And Officer Fields said that was fine with him as long as you put down the signs?

A As long as they were removed from the bridge, right.

Q Okay. In fact, Officer Fields told you that if you discontinued the spectacle of your demonstration, then you could stay on the bridge to watch what happened with the counter-protestors, correct?

A I don't think he used the word spectacle but he said if -- we could stay. I mean, we had a discussion and I think at first it was off and then, no, okay. I mean, there was misunderstanding maybe but then we could stay without signs.

Q Mr. Ovadal, was it clear to you that Officer Fields was not picking sides as to which side of the homosexuality debate

[65]

could protest on the overpass? Both sides, both sides with signs were asked to disperse, correct?

A Officer Fields made it clear that he was not picking sides or taking a stand on the issue.

Q When Sergeant Paulson arrived did he tell you repeatedly that the decision to order you to discontinue the demonstration was his decision?

A Yes.

Q He wanted to make it clear to you so you weren't blaming Officer Fields or anybody else?

A Crystal clear.

Q And he told you that he was the supervisor for the south and west districts at that time?

A Correct.

Q And with regard to the decision at that point in time, he was the person who had to make the call?

A That's what he said.

Q He told you there was no captain or lieutenant readily available on the police channel, right?

A Correct.

Q And he told you several times that the decision was based purely on traffic safety concerns and not at all on the content of your message, correct?

A He stressed that's what it was.

Q Did Sergeant Paulson give you examples of how he would have

[66]

responded if different groups with different messages or different agendas were up on the Beltline and causing the same traffic snarl and the same reported near collisions?

A He gave the example of the Green Bay Packers. He said he was a fan and even if they were up there supporting the Green Bay Packers, he'd make them leave.

Q Is it fair to say, Mr. Ovadal --

THE COURT: Was that then or now?

THE WITNESS: What's that?

THE COURT: Was that then or now.

THE WITNESS: He may have changed. I don't know.

BY MS. ROTTIER:

Q Is it fair to say, Mr. Ovadal, that you peppered Sergeant Paulson with questions challenging the basis for his decision?

A Yes.

Q Is it fair to say that Sergeant Paulson was trying as patiently as he could to end this incident so that he could free himself up and free his officers up to deal with other police matters that night?

A He was very patient.

Q And he was trying to end the incident, wasn't he?

A He was trying to resolve it I think.

Q You knew that Sergeant Paulson was not the final policymaker for the City on the issue of expressive activities on Beltline overpasses, isn't that true?

[67]

A Yes.

Q You knew he was the final decisionmaker with respect to this incident though, correct?

A By his acknowledgment.

Q Among the questions you asked Sergeant Paulson was whether you could conduct a protest on a Beltline overpass at 2 a.m. or 3 a.m. Do you remember that?

A Right. Right.

Q He didn't respond to that question, did he?

A I thought he did. We questioned anytime, anywhere, and he said in the City of Madison no. Now there were several questioning periods there.

Q Right. And have you looked at the transcript of the conversation between you and Sergeant Paulson?

A Right.
Q And would you defer to the transcript as showing whether or not he ever responded to that question?
A Oh, sure.
Q The question about being out there at two o'clock in the morning or three o'clock in the morning, that was largely a rhetorical question, would you agree?
A No.
Q Had you ever been out on a Beltline overpass --
A Well, it wasn't that I wouldn't do it.
Q Wait, sir.

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A But trying to establish if there's anytime a person could be out. So I would say it was hyperbole in that case with two o'clock.
Q You had protested six times on Beltline overpasses before the incident of September 2, 2003, correct?
A To the best of my recollection.
Q Had you ever protested on a Beltline overpass at 2:00 or 3:00 in the morning?
A No.
Q Let's talk about the six prior occasions during which you had protested on overpasses before this event. Those six occasions were all during the year 2002 and the first eight months of 2003, correct?
A I believe so.
Q And on those occasions you were engaged in expressive activities to convey a message about homosexuality, true?
A True.
Q And on those six occasions you observed no problems with traffic, true?
A Not that I can remember.
Q If you'd look at paragraph 11 of your second affidavit, please.
A Okay.

Q Does it say prior to the events on September 2, 2003 I displayed signs and banners on pedestrian overpasses in the

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Madison area on at least six different occasions. On these six occasions I never witnessed any problems with traffic.

A Correct.

Q On those six occasions when there was no traffic problem you were not ordered by City of Madison police to disperse, is that true?

A True.

Q Now on September 2, 2003, whether it was caused by the spectacle of the demonstration or caused by something else, you clearly observed the traffic problem, didn't you?

A In one --

Q Traffic wasn't --

A Not on both sides but on one side.

Q Traffic wasn't moving on a whole, was it the eastbound or the westbound lanes of the Beltline?

A It was the eastbound lane it wasn't moving. Westbound it was going freely to my memory.

Q From your interaction with Sergeant Paulson that night was it clear to you that he did not want you moving your demonstration from one overpass bridge to the next overpass bridge that night and creating the same problem, only at a new spot?

A It was clear.

Q Sergeant Paulson was just about to his police car and just about ready to take off when one of your associates said,

[70]

Hurry up, he's leaving, and then you went over to have a conversation with him about the American flag.

A I know I went over to have conversation. I don't remember the hurry up, he's leaving. Could have happened. I haven't the video for quite some time.

Q At that point did you launch into a three- to four-minute conversation with Sergeant Paulson about whether

you could go back up on the overpass carrying the American flag?

A I did have a conversation, yes.

Q You talked about your dad being in the military, his dad being in the --

A Yeah.

Q -- military, all of that?

A Yeah.

Q And he told you at least two more times during this conversation that his decision that night was not content-based at all, true?

A If you're saying it's from the transcript, true. I haven't viewed that thing for a long time.

Q And Sergeant Paulson in an effort to end this incident asked you, Hey, if you walk with that flag once over and once back, then are you going to voluntarily leave? He asked you that, didn't he?

A I do remember that.

Q And you agreed that if he allowed you to walk, he --

[71]

A Yeah.

Q He didn't prevent you from walking with the flag back and forth over, that then you would voluntarily depart?

A Yes.

Q And that's what you did?

A And that's what I did.

Q I would like you to go to paragraph 74 of your second affidavit, please, at the very end on page 12.

A Okay.

Q Mr. Ovadal, it says: I've reviewed the videotapes taken by Michael, is that Foht, Foht?

A Yes, Foht.

Q Foht on September 2, 2003 and October 11, 2003 and can verify that the videotape tapes are complete and accurate representation of my conversations with police officers for the Madison Police Department on those two dates. These

videotapes verify the accuracy of the conversations in quotes contained in this affidavit. True and correct copies of these two affidavits were previously submitted to the Court as exhibits during the preliminary injunctive relief hearing on July 4, 2004 -- July 7, 2004.

A Um-hum.

Q Did I read it correctly?

A You did.

Q And in fact that affidavit is incorrect, isn't it, because

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the exhibits that were submitted, the videotapes that were submitted at the July 2004 hearing left out, edited out your last conversation with Sergeant Paulson, didn't they?

A I thought it was correct when I signed it because I gave two videotapes to my attorneys.

Q Do you --

A So I thought I was talking about those videotapes. I'm sorry.

Q Do you now acknowledge, Mr. Ovadal, that the videotape previously --

A Um-hum.

Q -- given to the Court in July of 2004 was not complete because it left out your last conversation with Sergeant Paulson?

A That is what I've been told. You're talking about the flag conversation, right?

Q Right.

A Yeah.

Q Could you go to paragraph 41 of your second affidavit, please.

A Sure.

Q It says: When I was leaving, I encountered Sergeant Paulson who stated to me that the police department had received several reports from drivers who became angry upon viewing our signs and slammed on their brakes. He also

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confirmed that we would be arrested if we did not leave the area. Did I read it correctly?
A Yes.
Q Now the part about becoming angry on viewing the signs.
A Um-hum.
Q The viewing the signs is your editorial comment, isn't it? He didn't say that.
A He said they were upset by, I think he said they were upset by our signs.
Q Can you find anywhere in the transcript that he said they were upset by the signs? Have you looked for that?
A I believe he did use the word upset. I believe it's in the transcript, upset.
Q There is a reference to the word upset in the transcript.
A Uh-huh.
Q You're right about that.
A Okay.
Q But there is no -- there is nothing that I've been able to find with Sergeant Paulson saying that people became angry upon viewing the signs and slammed on the brakes. What I hear -- What I see in the transcript is this and I'll ask you if this conforms with your recollection of what Sergeant Paulson in fact said. I'm on page 42 of the transcript at line 20. Freedom of speech does not carte blanche give you the lawful right to go up on this overpass where traffic is coming 65

[74]
miles an hour and demonstrate. Okay? Because we had multiple calls to 911 from people that -- that are saying they had to slam on their brakes or slammed on their brakes and it's almost caused accidents. Remember him saying that?
A Yeah, I think I do. I mean, I haven't -- you know, I can't say word for word but it dealt with that.
Q All right.

A Ma'am, could I ask you which? I'm sorry, I lost my page. On the affidavit which number were we on? Was it --
Q You were on paragraph 41.
A Okay, I --
Q And would you like a copy of the transcript to look at?
A If we're going to go further in it, I wouldn't mind it.
Q I really -- I don't have much more but I'm certainly --
A Okay. Well, it's up to you.
Q -- willing to.
A Um-hum. Thank you.
Q The portion I was just reading to you is on --

THE COURT: The transcript you're giving him now is whose transcript?

MS. ROTTIER: It is the -- It's Plaintiff's Exhibit 10, Your Honor. It's the transcript that a court reporter tried to create from --

THE COURT: Yes.

MS. ROTTIER: -- listening with earphones

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and listening to the videotape.

THE WITNESS: Um-hum.

BY MS. ROTTIER:
Q And on page 42 of that transcript does it have the comment by Sergeant Paulson that I just read to you, sir?
A Forty-two. I have a page 40. I'm sorry. A pair of glasses would help a lot here. All right, where are we? Page 42, I've got it right here in front of me.
Q On line 20.
A Line 20.
Q And it goes over to the top of page 43.
A Yeah, that's, that's what you just read.
Q And there's nothing in there that they slammed on the brakes because of your signs?
A Not in that quote, no.
Q All right, let's go to Saturday morning, October 11, 2003. You led a demonstration that morning on a Beltline

overpass near the Park Street exit, correct?
A Correct.
Q Same banners, same signs, same flag?
A Yeah, I believe it was.
Q All right. Same number of people?
A No. I think we had a few more.
Q Okay. So a larger group.
A Yeah, there was I think -- after looking into our ministry

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records finally, I think there was about 14 as best we could reconstruct the whole thing.
Q Same level of spectacle in terms of the numbers of people, numbers of signs and so on, or even greater because of the numbers of people?
A There were more people there. About the -- I think about the same signs.
Q How long was the group engaged in displaying signs and banners that morning before you were approached by Sergeant Grady of the Madison Police Department?
A I believe about 20 minutes.
Q And Sergeant Grady ordered you to disperse because traffic was going very fast and he had concluded that the spectacle of your demonstration created a safety hazard for drivers looking up and seeing you. Is that what he told you?
A Well, that's not a direct quote. I mean, it's kind of like when I said that --
Q Is that the gist --
A -- Sergeant Paulson was angry or whatever. That wasn't a quote we just dealt with.
Q Is that the gist of what he told you?
A I think that was the gist of it.
Q Was it clear from Sergeant Grady's comments that his concern was about the safety hazard presented by the demonstration?

[77]

A That's what he said.
Q Did he recommend other venues where you could convey your message without creating a safety hazard?
A I think he went back to Greenway Cross again.
Q At the end of your conversation, it was relatively brief conversation, wasn't it?
A Um-hum.
Q About 10 minutes maybe?
A Yeah, something like that.
Q At the end of the conversation did Sergeant Grady point out where his station was located, actually physically point it out, and tell you when his captain would be there in order to encourage you to contact the captain to facilitate future protest activities?
A Yeah, I think he said it's back over that way and he's there Monday through Friday and all that sort of thing.
Q It was clear to you, wasn't it, that Sergeant Grady was not trying to squelch your message but rather trying to get you to display the message at a less dangerous spot?
A I think he wanted me to go to the captain and try to clarify what this whole thing was, it seemed to me.
Q It's clear, though, he didn't try to stop you from displaying the message. It was just that he wanted you to display it at a different location that he perceived to be less dangerous.

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A Yeah, he wasn't trying to ban me from everything.
Q Did you ever call Sergeant Grady's captain to facilitate a protest demonstration so you could get the same message out?
A I didn't even know captain -- or, I'm sorry -- Sergeant Grady's captain's name. I mean, we had already sent -- you know, contacted other people and I was waiting yet.
Q In your direct examination you talked about a letter that you authorized your attorneys to send the Chief of Police dated October 31, 2003. Do you recall talking about

that?
A Yes.
MS. ROTTIER: And that is Exhibit 6, Your Honor.
THE COURT: Yes.
BY MS. ROTTIER:
Q That's a demand letter, isn't it?
A I think that's what it's called.
Q It's not a letter asking for clarification, is it?
A Well, I should read it quick and see everything, but I --
Q Let me show you a copy.
A Yeah, would you? I'm not an attorney so --
Q I direct your attention to paragraph 4. You're not asking what the policy is, your attorneys are saying the policy is patently unconstitutional.
A Right.
Q And when you go to the end of the letter --
A Um-hum.

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Q -- in the third last paragraph, you make a demand that the City pay you some money and do what you want and then the City could avoid a lawsuit, correct?
A That's what's in this paragraph.
Q So there is nothing in this letter that's a request for clarification of policy. Would you agree with me?
A In skimming over it I'd have to agree with you.
Q One last topic, Mr. Ovadal. After the events of September 2, 2003 and the events of October 11, 2003 and your demand letter of October 31, 2003, you were back up on a Beltline overpass engaging in expressive activities with signs and banners, true?
A True.
Q This was the event on November 8, 2003, a Saturday, in --
A Correct.
Q -- late morning?

A Correct.
Q Did you have the same signs, banners and number of people?
A I don't -- it wasn't the same number of people, same banners and signs.
Q Was it a smaller or larger group?
A I would say smaller.
Q And you were up on the overpass for about an hour?
A That's what I would guess.
Q About 10:30 –

[80]

A Educated guess.
Q Between 10:30 and 11:30 in the morning?
A I believe it was.
Q Did you observe any traffic problems resulting from your demonstration that day?
A Not that I observed.
Q And your demonstration was allowed to continue, wasn't it?
A Yes.
Q And it was Madison police officers who had interacted with you at the scene and came to the conclusion that the demonstration could continue, correct?
A Correct.
Q This Beltline overpass was not under City of Monona jurisdiction as you had mistakenly thought, correct?
A That's what I was told.
Q Have you returned to that overpass that you thought was in the City of Monona but really is under City of Madison jurisdiction to engage in any expressive activities since November 8, 2003?
A No.
Q Mr. Ovadal, is it accurate to state that in the last five years you have engaged in expressive activities in numerous venues in the City of Madison?
A That's accurate.

Q You remember that I asked in some discovery questions to

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tell me where you had engaged in expressive activities and you listed some 33 different events and locations at, for example, the State Capitol grounds, the Kohl's Center, the DNR building, Martin Luther King, Jr. Boulevard, Camp Randall, and the Farmers Market on many occasions?

A Correct. Yes.

Q Those are all alternate places where you can express your viewpoint on political and social views, true?

A True.

Q You had answered in response to Mr. Kellum's question that you wanted to be up on the Beltline because there are more people on the Beltline and maybe more diverse people on the Beltline.

A I said there were more diverse people.

Q Well --

A I mean, that's my judgment.

Q That's your judgment.

A Right.

Q There is nothing distinctive about people that take the Beltline that would distinguish them from people who go to the Capitol Square or go to the Farmers Market or go to Camp Randall or the Kohl's Center or places like that, true?

A I believe there's people traveling through that don't ever stop in Madison even, and that's what I'm talking about, from different states and so on and so forth.

[82]

Q But there's nothing distinctive about them as a group of people other than they may be travelers?

A It's the makeup of, you know, where they're from and that sort of thing.

Q Is it fair to say overall, Mr. Ovadal, that there are many venues in Madison at which you can engage in expressive activities and you have?

A Yes.

MS. ROTTIER: Thank you. That's all I have.

THE COURT: Redirect.

MR. KELLUM: Just a couple of questions, Your Honor.

REDIRECT EXAMINATION

BY MR. KELLUM:

Q Mr. Ovadal, you were asked a series of questions regarding conversations between yourself and Officer Fields and Sergeant Paulson and Sergeant Grady. Today are you able to remember verbatim those conversations?

A No.

Q Does the video entered into as Exhibit 12 contain those conversations?

A Yes.

Q Particularly a couple things. You were asked about whether Officer Fields ever used the word disturb or, I believe your -- Do you recall any questions from Officer Fields as to if someone was disturbing you?

[83]

A Yeah. Just that he said if someone was disturbing you, wouldn't you want me to do something about it. I believe he used the word disturb there. Again, I would defer to, you know, the actual record.

Q Certainly. And I think you were asked about whether Sergeant Paulson ever used the word upset. Do you have any independent recollection whether Sergeant Paulson said where he didn't want to worry about someone slamming on brakes because they're upset?

A Right. He used the word upset.

MR. KELLUM: That's all I have, Your Honor.

RECROSS-EXAMINATION

BY MS. ROTTIER:

Q Just one clarification, Mr. Ovadal.

A Okay.

Q I wasn't suggesting that the word disturbed wasn't used and I'm not suggesting that the word upset was not being used. The point of my questions was to say you tied the disturbance and the being upset to your message.

A Um-hum.

Q And what I'm suggesting to you is that the many times I viewed the videotape and the many times I've reviewed the transcript, I don't see that connection. I'm asking you if you have any independent recollection that the officers ever said the people were disturbed by your message.

[84]

A You know, again I'd defer just to the record. I think there's a good record there. My perception was that I was constantly told that people are upset, and I assumed at the message. And, you know, I would just defer to the record on it. I mean, it's all in the record. I guess we can --

Q That's fine.

A -- just go through it.

MS. ROTTIER: That's all. Thank you.

MR. KELLUM: Nothing further, Your Honor, of this witness.

THE COURT: All right, the witness may be excused. We'll take a recess of 15 minutes returning at ten o'clock.

(Recess at 9:44 a.m. until 10:04 a.m.)

(Call to Order of the Court)

THE CLERK: Plaintiff's next witness, please.

MR. KELLUM: Call Mike Foht who's out in the hallway, Your Honor, and I could go get him if you --

THE COURT: Well, unless he can hear from here I'd suggest you do that.

MR. KELLUM: Mike Foht.

THE COURT: The witness may come forward

to have the oath administered to him.

MICHAEL FOHT, PLAINTIFF'S WITNESS, SWORN

THE COURT: You may proceed.

MR. KELLUM: Thank you, Your Honor.

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DIRECT EXAMINATION

BY MR. KELLUM:

Q Mr. Foht, if you could please state your full name.

A It's Michael James Foht.

Q And where do you live, Mr. Foht?

A N2097 Steiner Road, Monroe, Wisconsin.

Q And where do you work?

A I am involved in full-time Christian ministry.

Q And what ministry is that?

A I do -- through Pilgrims Covenant Church I do lots of lit dropping and street preaching and picketing, things like that.

Q Now were you a witness of the events that took place on a pedestrian overpass on September 2, 2003?

A Yes, I was there. I videotaped what was going on.

Q So you videotaped --

A Yes.

Q -- the conversations? Now there's been entered into evidence Exhibit No. 12. Does that contain all the conversations that you witnessed that day?

A Yes, to the best of my knowledge.

Q Now did you also witness events that took place on October 11, 2003?

A Yes.

Q Did you videotape those conversations as well?

A Yes, I did.

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Q And those are also contained in Exhibit No. 12?

A Yes.

Q On September 2, 2003 was Mr. Ovadal as well as you

and the group required to leave that pedestrian overpass?
A Yes. We were picketing there for, I don't know, close to two hours or so and we were approached several times by different officers and we were told that we had to leave. The first time I believe we were told by Officer Fields that we needed a permit to be picketing. And from there to my -- it went from that to we were obstructing traffic, and then it went to we were causing a disturbance because people were complaining about our message to them.
Q Did you see any near crashes?
A No, I did not observe any. There is no -- there was no crashes that day or any near accidents or anything.
Q On October 11, 2003 were you required to leave that overpass as well?
A Yes. We went out there for, it was a shorter time than the other and we were picketing for a while and I believe a Sergeant Grady approached us and told us that we would have to leave under threat of arrest. And we were forced to leave that overpass also and I had -- I was -- we were there under the understanding that it was in the Town of Madison because I had -- I have actually been -- I've picketed on that overpass in the past and there was a man that came up and attacked us,

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grabbed our signs. So I called the police and the police came, and the Town of Madison ended up arresting us because our signs were supposedly causing a disturbance. And the --

MS. ROTTIER: Objection, Your Honor; narrative.

THE COURT: Well, narrative and as far as I'm concerned it's lack of relevance as to what happened in the Town of Madison when it was under that jurisdiction. I don't know what relevance it has to the City of Madison and the incident that we've been brought to our attention.

MR. KELLUM: Sir.

THE COURT: I don't think you have to manufacture evidence which is not appropriate to consider.

BY MR. KELLUM:

Q As far as -- just, if you would, just tell us what happened that day on October 11, 2003.

A Again, it was just -- we were picketing there for, I don't remember a time exactly, and there was nothing going on. The traffic was very light. You know, the cars were going the speed limit. And we just were there for a short time and Officer Brady approached. I turned the video camera on and the whole conversation, I videotaped it, and it was all between Pastor Ovadal and Sergeant Grady, the conversation, and he just was telling us it's the same deal. The pastor was informing him that -- about previous September 2nd, 2003 talk that he had with another sergeant. I don't remember his name but he's

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sitting there. And then it was just the other officer was saying, or Sergeant Grady was saying that it's the same deal, that you'll be arrested. So we left.

Q Did you witness any near crashes on October 11, 2003?

A No.

Q Any slowdowns in traffic?

A No.

Q Did you attend the event with Ralph Ovadal in the City of Monona on a pedestrian overpass?

A Yes, I did.

Q And what happened there?

A I believe that was November 8th, 2003, and we went up -- I guess the reason I was bringing up the other Town of Madison thing is because we didn't think we were in the City of Madison when we were in the Town of Madison, and same thing with Monona. We thought we were in the City of Monona's jurisdiction and -- but it ended up being in the jurisdiction of the City of Madison. So we went there, picketed.

A lady officer approached. I don't remember her name. I had the video camera going the whole time just like I have had the video camera going the whole time in the other ones.

And she was, basically just said that our signs are no different than the signs along the side of the road. She said that people that were calling and complaining were obviously complaining because they didn't like our message and that we

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were fine. We were good to go, as she said.

Q Other than Mr. Ovadal and yourself, have you seen anybody else carrying signs on pedestrian overpasses in the Madison area?

A Yes. I've seen them affixed to the, to the overpasses that go over city streets. I've also seen them affixed to the Beltline. I've also seen people picketing on the overpasses, the same one we've been on. And there's one that goes a roadway which is on Fish Hatchery which is also over the Beltline. There was a group of demonstrators on the election day of November 2, 2004, and I actually went over there and did an interview with the people that were picketing and they were there for over two hours picketing there, unmolested, and --

Q Okay. Did you videotape the events that took place on November 2, 2004?

A Yes, I did. I was on -- I was on my way to do some ministry work and I had seen that there were picketers so I stopped and took the camera out and just went up and did a -- did a interview with them. And one lady I think, I can't remember, it had some Green, Emily Green I think her name is or something. I did an interview with her.

MS. ROTTIER: Objection, Your Honor; narrative again.

THE COURT: Sustained.

BY MR. KELLUM:

Q So who did you talk to that day?

[90]

A I talked to several of the protestors. Emily Green and another man that I got his business card.

Q Did the videotape show what you observed from the highway?

A The videotape? Yes. I had -- was driving along, videotaped from underneath as well and went off the exit on Fish Hatchery Road. Videotaped them there and then I pulled over and went out and did an interview. And I had done this throughout the day just to show how long they were out.

Q And how long was it?

A Oh, I think it was like two hour -- well, the one lady said she had been picketing. Emily Green said she had been picketing since 7:00, but at that overpass it was started at 11:00. And my observations, I parked and sat around and observed with the video camera and it was till 1:20, I think it was something like that, in the afternoon. So it was like two hours and 20 minutes.

Q Does the video show anything later in the afternoon?

A Yes. I had done another -- I did some ministry work that day and on my way back I noticed there was another protest that same day, it was election day, and that was -- it was just basically like our protests, you know. People just were holding signs, you know. They seen the traffic going underneath. And I had got up there. I asked them if I could get a few pictures and I did an interview with an alder-- alderman -- or, no -- it was a county supervisor from the

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Eighth District. And he said that what they were doing was unsafe. I asked him if the police had bothered them. He said no. And I did that for about, I was there about 20 minutes.

Q So were those two different overpasses or the same one?

A Yes, that was -- that was on, I don't -- I'm not so familiar with the streets. It's in between the one on Verona and Park Street. So it was like one in between there. It's -- I don't know the name of the road but it -- it was during rush hour, whatever, and traffic was all backed up along the side road so it was just standstill there and there was traffic. It was like 4:00-something in the afternoon and -- it was a different road.

Q Where was the first overpass?

A The first overpass on September 2?

Q No, no, no.
A Oh.
Q I'm talking about --
A Oh, the first one.
Q -- your video in November.
A Okay, I'm sorry. Yeah, okay. The first overpass was on Fish Hatchery Road and the other one was on a road that had -- I don't know, it's on another one that goes over the Beltline.
Q This videotape --
A Further west.

MR. KELLUM: This videotape is Exhibit No. 9, Your

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Honor.
BY MR. KELLUM:
Q To your knowledge was anyone on either overpass that you noticed on November 2nd, 2004 required to leave?
A No.

MR. KELLUM: And that's all I have for now for this witness, Your Honor.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MS. ROTTIER:
Q Mr. Foht, during his testimony Mr. Ovadal indicated that six times prior to September 2, 2003 he had engaged in expressive activities on Beltline overpasses. Can you tell us on how many of those six occasions you participated as one of the individuals engaging in expressive activity with him?
A I don't -- I don't recall.
Q Some of them?
A I've been there, oh, I've probably picketed on those overpasses 10 to 12 times myself, so I don't recall.
Q Prior to the occasion of September 2, 2003?
A Well, probably including that, something like that.

Q All right. So 10 to 12 times including September 2, 2003 and you were saying in your direct examination that on one occasion there was some interaction between you and other protestors and Town of Madison police, correct?

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A Well, that was --
Q That's just a yes or no.
A -- struck down as far as for answering that. I mean I --
Q Can you just answer yes or no? Am I correct that of the 10 or 12 times that you were engaged in expressive activities on Beltline overpasses up to and including September 2, 2003 you had interaction one time with Town of Madison police?
A Yes.
Q Correct?
A Yeah.
Q With respect to the 10 or 11 other occasions, you were not stopped by City of Madison police from engaging in expressive activities, true?
A I've had lots of -- you know, there's been police officers that come up on many of the occasions.
Q Have you --
A City of Madison police officers.
Q Yes. But have you ever been ordered to disperse under threat of arrest prior to September 2, 2003 by City of Madison police officers?
A My memory would not be able to -- I'm ordered almost on a weekly basis to stop picketing --
Q Okay.
A -- in town, so it's just --
Q But you –

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A -- becomes a big blur to me. I mean, I have this -- I mean, usually an officer will try to come up and tell you you can't do this because you're causing a disturbance. And we just tell them about the law, how that free speech --

Q Let me stop you there, sir.
A -- so there's no problems then.
Q You've answered my question and let me ask a different one. If I'm understanding correctly, your memory is not perfect on whether you ever had a prior occasion with a City of Madison police officer who ordered you to disband a protest prior to September 2, 2003. Did I get that right?
A I cannot recall a specific date and time but I know I've had police contact before.
Q Yes. That wasn't my question, sir. My question is focused and specific. Prior to September 2, 2003 can you tell the Court of any particular occasion when a City of Madison police officer not only interacted with you but actually ordered you to disband under threat of arrest?
A I can't think. I can't remember in my mind right now --
Q All right.
A -- of a date.
Q Did you say you tape the videos of all your protest activities?
A Most of the time I'm videotaping.
Q On the occasions in which Mr. Ovadal recalls having

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protested on the six times before September 2, 2003, he indicated he saw no traffic problems. How about you, Mr. Foht? Of the whatever number it was of the six that you were with Mr. Ovadal did you observe any significant traffic problems developing on the Beltline in the area where the expressive activity was taking place on those six prior occasions?
A I have not. I've never seen any near accidents or any --
Q So the answer to my question is no.
A No.
Q Based on your own personal experience, Mr. Foht, would you agree that the City of Madison did not have any

policy to interfere with expressive activities on Beltline overpasses in general at least up until your incident of September 2, 2003?

A I would say that's pretty accurate.

Q When was the last occasion prior to September 2, 2003 that you and Mr. Ovadal engaged in expressive activities on a Beltline overpass, do you know?

A I don't know the dates.

Q Okay. Several months or was it weeks or days, anything?

A I've been doing ministry work with Pastor Ovadal for many years and it's hard to remember --

Q Are there other venues --

A -- exact dates. There's nothing that sticks out in my mind.

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Q Okay. Are there other venues in the City of Madison where you have engaged with Mr. Ovadal in expressive activities other than Beltline overpasses?

A Yes.

Q Would those include the Kohl Center, Camp Randall, the Gay Pride Fest, Capitol Square, Farmers Market, DNR, Martin Luther King Boulevard, and the Capitol grounds and the sidewalks on public streets?

A Yes.

Q Would you agree that you have --

A All of those.

Q -- engaged in expressive activities on various venues in and about the City of Madison more than 50 times in the last two, three years?

A Yes.

Q Would you agree there are plentiful places in and around Madison at which you are able to engage in expressive activity?

A There are plenty of places in Madison that you can be engaged in expressive activity, yes.

Q Now on September 2nd, 2003 you were one of the group with Mr. Ovadal on the Beltline overpass between the Seminole Highway and Verona Road exits, is that right?
A Yes.
Q And was the number of people that the group consisted of

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about 10?
A Yes.
Q And you had two large yellow banners, each 16-foot long, two or maybe three signs and a large American flag?
A Yeah.
Q Would you agree that the size of this gathering created a fairly substantial spectacle up on the overpass?
A No. No. There was -- there was 10 people on the overpass --
Q You've answered my --
A -- on Fish Hatchery during the election.
Q You've answered my question, sir. How long had you planned to stay on September 2, 2003?
A We don't set times on things. We just go to picket sometimes and stay until we go.
Q You intended to go picket during rush hour, correct?
A We had done several ministry work that -- several different things on that day and we just happened to do that ministry at the time we were there.
Q And it was rush hour?
A On which day again was it?
Q September 2nd, 2003.
A Yeah.
Q Do you acknowledge, Mr. Foht, that the City of Madison has a compelling interest in safeguarding the well-being of

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motorists traveling on the Beltline?
A The City of Madison has, yes.

Q A compelling interest.
A They have a compelling interest. Well, I mean, it depends. Is it the jurisdiction of the City on the Beltline or is it sheriffs? I don't know who patrols the Beltline. I mean I think --
Q How about --
A -- the sheriff would probably be more of their jurisdiction.
Q Well, how about if we state it this way. Whatever municipality or police authority has jurisdiction on the Beltline, that authority has a compelling interest in safeguarding --
A Yes.
Q -- the safety of people traveling. Do you travel the Beltline frequently yourself?
A Yes, I do.
Q Are you aware that it is a high speed, heavily traveled roadway?
A Yes.
Q Are you aware that there's congestion on the Beltline frequently during rush hour?
A Yes.
Q There's congestion on the Beltline in times other than rush

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hour?
A Not very often unless there's an accident or something.
Q Are you -- Excuse me. Are you aware that speed limit on the Beltline is officially 55 miles per hour?
A Yes.
Q Are you aware of the fact that a lot of traffic goes a lot faster than that?
A I guess.
Q Well, if you've driven on the Beltline you know that, don't you?
A Well, I usually go 55.

Q Okay. And traffic isn't passing you?
A Sometimes I guess. Depends on when you're traveling.
Q Do you recognize that most parts of the Beltline have three lanes of eastbound, three lanes of westbound and numerous on and off ramps?
A Yes.
Q Would you agree, Mr. Foht, that the overpass where you and Mr. Ovadal set up the demonstration on September 2, 2003 sits above a particularly dangerous stretch of the Beltline?
A No.
Q Do you know whether the right-hand lane of westbound traffic can find itself on an exit ramp without wanting to be on an exit ramp unless it's paying pretty close attention? Do you know one way or another?

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A The road is set up I -- you know, I don't --
Q You just don't know.
A You're talking about right bound and you're going --
Q Right-hand lane, westbound.
A Where are you talking about? Coming in off of what? Off of Verona Road are you talking about?
Q No. Through traffic on the Beltline, right-hand lane, westbound, passing Seminole.
A I'm not sure where Seminole is. I'm sorry.
Q Okay.
A I'm just --
Q All right. Let's just leave it that you're not really aware of that, correct?
A Yeah.
Q Okay. While you and Mr. Ovadal were conducting your expressive activities on the Beltline overpass on September 2, 2003 along with eight other people, there were traffic problems that developed on the roadway, weren't there?

A On September?
Q 2, 2003.
A Yeah, okay. I'm not aware of any --
Q Traffic wasn't --
A -- accidents or anything like that.
Q No. Traffic problems I'm saying.
A Well, it's normal so I don't think it's a problem. I mean

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it's usually.
Q Did you see traffic all backed up in one direction?
A Yes, it's -- toward the end of the thing I think.
Q When Officer Fields was interacting with you and Mr. Ovadal on the overpass that day, he told you that he had been involved in the traffic slowdown himself, correct?
A Yes.
Q And you had no reason to think he was lying about that, did you?
A I don't -- I don't know whether he -- I have no reason to think he was lying, no.
Q And he told you that he concluded it was the spectacle of your demonstration that caused the slowdown, didn't he?
A No.
Q He didn't say that?
A No, he never said it was because of the spectacle of our demonstration that traffic was backed up for -- the traffic was backed up for miles down the road I'm sure ahead of us. The traffic is backed up all the way on the whole Beltline when --
Q Do you understand, Mr. Foht, that a transcript was prepared of the edited videotape of September 2, 2003?
A Yes.
Q I'm going to show you a copy of that and then direct your attention to a particular page.
THE COURT: On this Exhibit 10?

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MS. ROTTIER: Yes.

BY MS. ROTTIER:

Q Have you seen that transcript before, Mr. Foht?

A No.

Q If you'd go to page 29, and there are four pages on a page so I'll let you figure out how to get there.

A I got it.

Q If you look at line 20 it says: Mr. Ovadal: Have you seen any near crashes? Officer Fields: Okay. I haven't seen any near crashes. I did see a slow-up. I was in it.

Mr. Ovadal: It wasn't from us. Officer Fields: I'd imagine it was. I was on that side approaching here. You were already --

A Where's --

Q -- visible. Do you see that?

A It says: Mr. Ovadal: It wasn't from us.

THE COURT: Next page.

THE WITNESS: Oh, I'm going -- oh, it's down. I'm sorry, I was looking over here.

BY MS. ROTTIER:

Q Okay.

A Okay, go ahead.

Q And then Officer Fields says, I'd imagine it was. I was on that side approaching here. You were already visible. Traffic sped up, and then the next word's inaudible.

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Did I read it correctly?

A Yeah, you read it correctly.

Q And that does indicate --

A It doesn't say spectacle and nothing --

Q Does indicate that Officer Fields said in response to Mr. Ovadal saying the slow-up wasn't from us, he said: I imagine it was.

A Well, traffic was way back -- My testimony is, is that the traffic was backed up way ahead of us from that. And if he came from --

Q You've answered the question. Is it a fair statement that in his interactions with you and Mr. Ovadal and the other demonstrators on September 2, 2003, Officer Fields was expressing repeated concern about public safety?
A Yes, he had said that.
Q And he wanted your group not to disband the demonstration but to move it to the side.
A No, he wanted us to disband.
Q Didn't he at first ask you to move it to the side?
A He said many things that day. First, it was we needed a permit. Second, it was we were obstructing traffic. The third, it was causing a disturbance because people were calling in who were upset with our signs.
Q Okay. Would you look at page 2 of the transcript? On line 3 and 4 does Officer Fields say you really just need to take

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your protest someplace else?
A Yeah. To me that means get out of here.
Q And so he wasn't asking you to stop protesting, he was asking you to protest at a different place, wasn't he?
A Oh, I didn't take that to mean that.
Q All right. When Mr. Ovadal -- and let me establish this. Mr. Ovadal was speaking as the --
A Yes.
Q -- leader of the group of the demonstrators, correct?
A Yes.
Q And when Mr. Ovadal declined to voluntarily leave in response to Mr. -- to Officer Fields' request, at that point Officer Fields contacted his sergeant by police radio, correct?
A Yes.
Q The sergeant's first response, just based on what he heard from Officer Fields, was to let the demonstration continue, correct?
A Yes.

Q And then Officer Fields and the other two officers who were with him left the area, right?
A Yes.
Q And they were gone for about a half hour before they came back?
A Yeah. I'm not sure of the time they were gone.
Q And your group kept on with the demonstration for the next

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30 minutes with no police interference.
A Yes.
Q Is it fair to say then, Mr. Foht, that as of that time, five o'clock on September 2, 2003, the City of Madison did not have any established policy of interfering with your expressive activities on Beltline overpasses?
A No, to me it was the beginning of the interference.
Q Hadn't been ordered off.
A Well --
Q Been up there for about an hour.
A Then it went up to a superior and the superior said leave it alone, leave us alone.
Q But as of five o'clock you had been up there for about an hour. You hadn't been ordered off, correct?
A Well, we had been ordered off but we were -- it changed.
Q Not under threat of --
A It was changed.
Q Not under threat of arrest, correct?
A Pretty close but --
Q Not under threat of arrest, correct?
A Well, my memory -- I'm not sure.
Q You videotaped the interaction of Officer Fields with the people on the demonstration, correct?
A Yes.
Q You intended the videotape to be a complete record of what

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the police said at the scene?
A Yes.
Q You prepared an affidavit dated October 10, 2005 in this case, Mr. Foht?
A Yes.
Q Let me show you a copy of it. In paragraph 6 of the affidavit you say you videotaped all of the conversations of Professor Ovadal with the police officers on that date?
A Yes.
Q And in paragraph 7 do you say that Officer Fields told you it was disorderly conduct because individuals were disturbed by your message?
A Yes.
Q Have you reviewed the transcript of the videotaped conversations to determine whether or not the words "disturbed by your message" were ever uttered by Officer Fields?
A The transcripts I have not looked at.
Q Is it possible, Mr. Foht, that Officer Fields talked about callers being disturbed without ever tying them to whether the disturbance was caused by your message?
A To my memory it was because of the message that they were disturbed.
Q That's what you understood?
A Yes.
Q Right?

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A That's right.
Q You understand though, Mr. Foht, that people who are caught up in a traffic jam not of their own making can be disturbed for many reasons without necessarily caring one whit about your message?
A I don't believe there was a traffic jam when he first arrived.
Q Could you answer my question though? Assume a

hypothetical where there is a traffic jam and people are caught up in it. They could be annoyed if they saw a spectacle of a demonstration that they believed contributed to it without caring at all what the message was. Would you agree with that?

A It's so hypothetical, ma'am.

Q Could you answer it though?

A Well, I don't consider picketing a spectacle so, I mean --

Q It was a hypothetical, sir.

A You could -- you could be annoyed because you spilt a glass of milk on your --

Q Right.

A During a thing.

Q Exactly. You can be annoyed --

A Call your lawyer.

Q -- for lots of different reasons.

A Call the police, call whatever.

Q Officer Fields stressed to you and Mr. Ovadal that he wanted

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you to move the location of your protest in the interest of public safety and not to squelch your message. Is that correct?

A I don't recall. I'd have to see the transcript if he said that because I don't --

Q You don't remember --

A I don't.

Q -- that the stressed public safety concerns?

A I do remember some, some talk about public safety but that's always the talk when a person is picketing.

Q Would you go to paragraph 12 of your affidavit, please?

A Okay.

Q It talks about the fact that as you were leaving you encountered Sergeant Paulson who stated to you that the police department had received several reports from drivers who became angry upon viewing our signs and slammed on their brakes.

A Yes.
Q Did you check the videotape when you wrote this affidavit to see whether or not Sergeant Paulson really said that the drivers had become angry upon viewing the signs?
A I have gone over the videotape. I didn't check it at that time, no.
Q Do you know whether in fact Sergeant Paulson ever said that the people had become angry on viewing the signs?
A I guess I would just say what the video says is what happened, because I was there. I videotaped the whole thing and

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I can't remember the exact specifics.
Q And that's fine, Mr. Foht, but the --
A Of exactly what he said, so --
Q What you're saying is fine, that we can rely on the videotape.
A Sure.
Q But the problem is that you put it in an affidavit that you swore to under oath and in the --

MR. KELLUM: Object. Is that a -- That's not even a question, Your Honor.

THE COURT: No, it's not and that's why the Court will suggest that the form of the question is inappropriate at this time.

BY MS. ROTTIER:
Q In this affidavit that you swore to under oath, can you now say whether it is accurate that Sergeant Paulson said the words "drivers became angry on viewing the signs." Do you know if he said that?
A This is a summary affidavit of what took place.
Q Could you --
A It summarizes what happened between --

MS. ROTTIER: Move to strike as nonresponsive.

THE COURT: So ordered.

BY MS. ROTTIER:
Q Can you answer the question? Having put in an affidavit

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under oath, can you tell me now whether you specifically recall Sergeant Paulson saying that drivers became angry upon viewing the signs?
A To the best of my memory I believe he said it.
Q All right. So we should be able to find that in the transcript of the videotape?
A I believe he had said that people were slamming on their brakes.
Q Right. That's agreed. The question is did he tie it to seeing the signs.
A Well, I guess that would be more of an assumption on my part.
Q All right, fine. Could you understand, Mr. Foht, that motorists could very well get upset by a traffic snarl caused or contributed to by the spectacle of the demonstration without caring about the message of the demonstration?
A I can't answer that question for people.
Q Okay. While you were on the overpass did a counter-protest develop?
A No. Oh, which -- which one are you talking about?
Q September 2, 2003.
A Yeah.
Q Did a counter-protest develop?
A Yeah. Yeah. Well, I don't know if it was a counter. I don't really know what their sign said.

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Q Okay. Didn't say Hatred Is Sin?
A I don't remember what their sign said.
Q When Officer Fields ordered your group off the overpass, he also ordered the counter-protestors off the overpass?
A Yes.

Q He wasn't playing favorites depending on which point of view he liked better?
A My memory's a little better. What had taken place is we --
Q Could you just --
A We were ordered off.
Q Right.
A And I said something to him, I don't remember the exact words, but what about them? What about them? And then he was basically forced to go over and take care of the situation.
Q So you were the impetus for him doing that?
A Yes.
Q But both groups went off?
A They left, yes.
Q I want to direct your attention to paragraph 40 of the affidavit. In there are you saying that you reviewed the videotapes and that the videotapes are complete and accurate and that true and correct copies were previously submitted to the Court during the preliminary injunction hearing in July of 2004?
A Yeah.
Q At the time you prepared this affidavit under oath did you

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know that the September 2, 2003 videotape was not complete?
A There were two videos, yes.
Q Did you know at the time you filled out the affidavit that it was that the -- that the videotapes submitted to the Court and to me as defense counsel were not complete?
A The one was so --
Q No, that's not my question, sir. When you filled out the affidavit under oath did you know that the videotapes submitted to the Court were not complete?
A They were -- the one was complete so it was --
Q One was complete and one wasn't.
A One was had just got rid of the irrelevant things.

Q Did you do the editing?
A No.
Q Now when you irrelevant, you're talking about a whole conversation between Sergeant Paulson and Mr. Ovadal, correct?
A Yes.
Q And during that whole conversation Mr. Ovadal said, Please let me go walk up on the overpass with the American flag. I'll just go over and back once and then I'll voluntarily leave. And Sergeant Paulson agreed to that, correct?
A Yes.
Q And in fact then you did voluntarily leave?
A Yes.
Q During the conversation that was edited out of the videotape

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did Sergeant Paulson reiterate two more times that his decision that night was not content-based?
A He was trying to say that it isn't content-based.
Q That it was not.
A Said it -- he had said it. Yeah, he said it was not a few times or --
Q Did Sergeant Paulson during that last conversation indicate by, maybe not even words, but by gestures and facial expressions that he was trying to bring this incident to a close so that he and his officers could get on to other police business?
A Yes, he had another call. There was some other thing going on so he was seeing that it was going to be content-based; that if a pastor could walk across with a flag, then why couldn't he hold a sign, and he was struggling with that and --
Q Okay.
A He just had wanted --
Q Let's --
A -- to get out of there basically.

MS. ROTTIER: Move to strike that as

nonresponsive.

THE COURT: So ordered.

BY MS. ROTTIER:

Q Let's talk about the videotape of events on election day, November 2, 2004. The timer on the videotape is off by an hour, is that right?

A Yes, on the clock I just don't –

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Q So you have to go back an hour?

A Yes.

Q And where you saw the woman named Emily Green, which Beltline overpass was that?

A That was on Fish Hatchery Road.

Q All right. Now --

A Where it comes across the Beltline.

Q That is not only -- that's not a pedestrian overpass, is it?

A No.

Q It's a pedestrian --

A It's -- well, it's pedestrian and --

Q And vehicular traffic. And in fact there are two lanes in each direction plus an on ramp or exit ramp for the Beltline separated by a concrete median on the Fish Hatchery bridge, correct?

A Yes.

Q And the people that had carried election banner signs that day were mostly directing their activity towards the vehicular traffic on the Fish Hatchery Road bridge, weren't they?

A No. They were -- they were doing it both ways. I mean, they had signs, I mean, posted on --

Q Sure. They had --

A -- the thing. You can't see them if you're driving on Fish Hatchery, you know. They were getting the people coming

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underneath. And I had first noticed them because they were --

Q You --

A -- waving and shouting at me when I went underneath the Beltline.

Q Sir, you've answered my question. Let me ask another one. It's correct, isn't it, that there were about five people?

A There were more than that.

Q The videotape though should show the numbers?

A Yes.

Q Have you looked at the videotape recently?

A Yeah. There were different -- the first one that I had videotaped --

Q Have you looked at the videotape recently?

A Yes, I have.

Q All right.

A I watched it this week.

Q Is there anywhere on the videotape that shows more than five people?

A I believe that -- on which, which one? I mean the first one I saw --

Q Fish Hatchery.

A -- on the videotape wasn't -- was on an overpass with only pedestrian traffic and it was a woman, one by herself, walking with a Kerry sign back and forth yelling at people as they went by underneath the thing. So that's the first one.

Q All right. Sir –

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A The second one that I --

Q Sir, please listen to my question. On the Fish Hatchery vehicular bridge that you were talking about, do you have any videotape that shows more than five people holding the sign?

A To my -- to my knowledge I thought there was more than five. I believe there was about, I think I counted about eight, but maybe I'm wrong.

Q All right. Now there were people that had megaphones, weren't there?
A Yes, there was one gentleman who I've got his card if you want his name in my jacket.
Q Okay. And he was directing the megaphone towards the vehicular traffic on Fish Hatchery, wasn't he?
A He was directing it everywhere.
Q That's just a yes or no. Was he?
A He was directing it everywhere.
Q He was directing it at vehicular traffic saying, Vote, vote Kerry today for a better tomorrow.
A Yes.
Q Several times.
A Yes.
Q At the traffic that was going on the bridge.
A Well, yeah. I mean, mostly I would say there, yes.
Q You were looking around with your video camera for police

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cars in the area, is that right?
A Yes, I was.
Q And you photographed a couple of police cars, didn't you?
A Yes.
Q And those were not City of Madison police cars, were they?
A The first one that I photoed was an unmarked squad and I believe it was the City of Madison.
Q What led you to believe it was the City of Madison?
A I cannot be positive.
Q The fact is --
A I know that there were two. What is the town adjacent? Is that Fitchburg?
Q They were City of Fitchburg vehicles, weren't they?
A Fitchburg. Yeah, there were two of those, yes. But I know that like on the first -- you're wanting to deal with just

the Fish Hatchery, right?
Q Right.
A Okay.
Q I'm wanting you to just listen to my question, okay? The Kerry-Edwards posters that were up against the fence or the -- yeah, fence, so that people driving on the Beltline could see them, they were typical campaign issue posters, right?
A Yes. And some, I think they were.
Q And anyone paying attention to the political campaign that year, whether Democrat, Republican, Independent or nothing at

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all, would have seen signs like that hundreds of times in the lead-up to election day. Would you agree with that?
A I would have to defer to the video because I'm not sure exactly. I know there were some Kerry signs.
Q No, no.
A I know there were -- I can't remember if there were any hand --
Q You're misunderstanding my question.
A I can't remember if there were any ones that were written purpose, you know, with words different than those. So I can't be sure.
Q I'm talking about the Fish Hatchery bridge again.
A Yeah, I know.
Q And I'm talking about the Kerry-Edwards signs that were along the side of the fence could have been vis--
A I'm just saying there may have been other signs and I'm not sure.
Q Right. The Kerry-Edwards signs that could have been visible to traffic on the Beltline. Are you with me so far?
A Um-hum.
Q Will you agree with me that those were standard issue campaign signs that anybody who was paying attention at all in this politically saturated city and state would have seen

hundreds of times in the lead-up to the election day?
A Yes.

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Q Would you acknowledge, Mr. Foht, that motorists are not as likely to be startled or distracted in their driving by seeing something they've seen a million times before than they would be in seeing something like a 16-foot big bright yellow banner bearing a message they hadn't seen up on the Beltline before?
A It depends. If you're a Bush supporter it might make you kind of angry.
Q Is that your real answer?
A Especially -- maybe -- well, it was kind of offensive to me that I wouldn't be able to hold a sign up there without getting arrested.
Q No.
A And they could.
Q Here's my question.
A So I was upset but -- I'm not -- I can't -- I'm not a psychologist. I don't know what people are thinking. Whether it's a standard sign or a big banner, it's a sign is a sign as far as I'm concerned.
Q I'm going to state the question one more time and see if you can respond to me. If not, we'll move on. Would it make sense to you, Mr. Foht, that people driving on the Beltline would not likely be as distracted in their driving if they noticed a big Kerry sign that they had seen a million times before, contrasting that situation with seeing a big yellow banner that says Homosexuality Is A Sin, a message they hadn't seen –

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A I don't think there'd be any --
Q -- a sign they hadn't seen.
A I don't think there should be any difference.
Q All right, that's fine. Now could you look at paragraphs 25 to 27 of your affidavit, please. In that part of

the affidavit you're talking about speaking with Emily Green, one of the Kerry supporters who was up on the bridge that day?

A Yes.

Q Now you say in here that she told you she'd been holding signs since seven o'clock that morning. See that?

A Yes.

Q Now that's a little misleading, isn't it, to put that in the affidavit that way?

A Well, that's what she said.

Q You know she wasn't holding up signs on the Beltline overpass that morning, don't you?

A I know she -- I saw her very early in the morning on a different -- on the walkway on -- by the Verona Road -- it was the same lady. She was the one that was walking with the sign so I saw her earlier in the morning -- in the day.

Q Emily Green is the woman on the videotape who says that she was -- she was holding Kerry signs at University and Midvale earlier in the morning, correct?

A Yes.

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Q And she says she was poll watching for part of the morning?

A Yes.

Q Right?

A Yes.

Q And she says that she didn't come up to this particular location until 11 a.m.

A Yes.

Q And so for you to say she was holding signs since 7 a.m. this morning isn't exactly accurate with what she told you, is it?

A It's exactly accurate.

Q All right. She did not tell you she was up on the Beltline overpass holding signs from seven o'clock that morning, did she, sir?

A It doesn't say that.
Q Correct, it doesn't say that.
A It doesn't say that in my affidavit.
Q All right. So you don't think that's misleading to have said she's holding signs after your discussion about Beltline there?
A No, and I'm -- and I freely gave them my testimony earlier before the Court here that it was 11:00 when she told me she was at that particular thing. I'm not trying to hide anything or mislead the Court in any way.
Q You didn't film any disruption of Beltline traffic that day

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as a result of the Kerry-Edwards signs, did you?
A I'm sorry. Could you repeat the question?
Q You did not film any disruption of Beltline traffic that day as a result of the Kerry-Edwards signs on the Fish Hatchery bridge, did you?
A I -- On the Fish Hatchery -- see, I don't -- the -- I didn't -- I don't think there was any backup there. I know there was, like I said, pre-- on the next picket there was backup traffic. But, no, not there.
Q One other line of questioning for you, Mr. Foht. On November 8, 2003, a Saturday, were you displaying signs and banners on a Beltline overpass that you thought to be within the jurisdiction of the City of Monona but was really within the jurisdiction of the City of Madison?
A Yes, on -- yeah, November 8 I believe.
Q And on that occasion I believe you said you were approached by a City of Madison officer who said that it was acceptable for you to continue the protest?
A Yeah. She said you're good to go.
Q All right.
A After the discussion.
Q All right. And she said to you that if there had been any complaints that were specifically about the message she

wasn't going to take an action based on that, correct?

A Well, like I said, what she said exactly was that the –

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well, not exactly -- to the best of my memory was that there were complaints I believe and it was obvious that people didn't like our message. They complained.

Q And so she didn't take action --

A Yeah.

Q -- in response to that kind of complaint?

A Yes.

Q It's fair to say then, Mr. Foht, that if the City of Madison had any policy banning all signs and banners by your group on Beltline overpasses the sergeant you dealt with on September -- on November 8, 2003 didn't know about it?

A I don't think she was a sergeant. I think she was just a police officer.

Q Police officer.

A I don't think she had knowledge of it.

Q Okay. You have no reason to believe there was such a policy as of that date?

A Well, we did have a -- that's why we picked that one. We thought we were going to a place where the City of Madison wasn't going to have -- be able to throw us off.

Q And in fact the City of Madison did have jurisdiction and didn't throw you off, correct?

A Yes.

MS. ROTTIER: That's all I have. Thank you.

MR. KELLUM: Nothing further, Your Honor.

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THE COURT: The witness may be excused and plaintiff may call his next witness.

MR. KELLUM: Yes, Your Honor. Your Honor, at this time there's no further live witnesses. We would just point out to the Court a joint stipulation of Greg Ovadal.

THE COURT: Yes.

MR. KELLUM: Which would include --

THE COURT: The Court has read the statement and your --

MR. KELLUM: And also the Exhibit 7 that goes along therewith.

THE COURT: All right.

MR. KELLUM: And the only thing that we would add, Your Honor, this is already in the record, and if I could just read from amended answer. It would be paragraph 21 of defendants' amended answer stating: Answer in paragraph 24, defendants admit the first and third sentences and clarify the second by explaining that Officer Fields advised plaintiff and his group that display of his message on the busy Beltline overpass was creating a traffic safety hazard. And with that, Your Honor, we would conclude the proof.

THE COURT: All right, you rest at this time?

MR. KELLUM: Yes, Your Honor.

THE COURT: Do you have -- Are you withholding any exhibits that you wish the Court to examine? I asked you that

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before.

MR. KELLUM: No, Your Honor, we're not withholding.

THE COURT: All of the exhibits --

MR. KELLUM: Well, except we sent out --

THE COURT: It isn't what you -- you know, it must be contagious at that table.

MR. KELLUM: There was a letter --

THE COURT: Can you answer my question?

MR. KELLUM: I'm sorry. Sure, I'll be happy to.

THE COURT: Do you have any additional exhibits which have been received or not received which

have not been submitted to the Court?

MR. KELLUM: No, Your Honor.

THE COURT: Thank you. At this time then we'll hear the defendants' first witness.

MS. ROTTIER: The first witness will be Don Johnson.

DONALD JOHNSON, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MS. ROTTIER:

Q Would you give us your name, please?

A Donald Johnson.

Q And, Mr. Johnson, in which city and state do you live?

A Fort Atkinson, Wisconsin.

Q How are you employed, Mr. Johnson?

A Deputy sheriff.

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Q Of what county?

A Jefferson County.

Q How long have you been a deputy with the Jefferson County Sheriff's Department?

A About 11 and a half years.

Q Mr. Johnson, on Tuesday, the day after Labor Day, in September 2003 did you have occasion to be traveling on the Beltline highway?

A Yes, I was.

Q Were you in the course of your employment as a deputy when you were traveling on the Beltline that day?

A No, I wasn't.

Q Just a private citizen or what?

A Yes, I was traveling in my personal vehicle.

Q Where were you coming from and where were you going to when you were traveling on the Beltline that day?

A I was coming from visiting my family and heading back home to Fort Atkinson.
Q All right. Do you recall the time of day you were on the Beltline?
A It was in the late afternoon.
Q Early part of the rush hour?
A Yeah.
Q Do you recall the extent of traffic as you were traveling on the Beltline, Mr. Johnson?

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A As if the traffic was heavy or --
Q Yes.
A -- medium?
Q Yes.
A It was -- as I was getting up there it was starting to build up.
Q Okay. Did anything out of the ordinary occur with respect to the flow of traffic as you were traveling on the Beltline that day?
A After I got on the Beltline, way ahead of me vehicles started slowing down and when I looked up I could see some people holding a bright banner. I looked back down at the traffic in front of me and I could see people were slamming on their brakes or dynamiting their brakes in front of me and I almost hit the vehicle in front of me. And that's when I picked up my cell phone and I called 911.
Q You used a phrase in that answer "dynamiting the brakes." Maybe that's police talk. What does that mean?
A Well, normally when you're driving you want to slow down or stop someplace, you just gently put on your brakes and it slows you down. Dynamiting the brakes would be you just slam them on as hard as you can and you hold on to it and the vehicle will just nosedive.
Q Did you actually observe that happening in some of the vehicles ahead of your position?

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A I saw them -- I saw the vehicles coming to a stop very suddenly. I saw vehicles that were weaving in a lane crossing over into other lanes coming back.
Q And weaving as they stopped and moved over into -- in other words, as they slammed on their brakes they moved over to another lane?
A They were crossing over into the lane like maybe about a foot, two foot, and then coming back in their lane like realizing that they were out of their lane as they were looking up at what the -- the bright sign.
Q What did you see first, the traffic braking and weaving or the signs and banners?
A I first saw way ahead of me when I was coming into the traffic, I saw the traffic slowing down. And then I started looking around to see what was going on and that's when I saw the banner.
Q How many people do you estimate were up on the overpass at the time your attention was drawn to the banner up there?
A I couldn't tell you an exact number because I didn't keep my eyesight up there for very long. I was more concerned with the traffic around me.
Q Do you have any estimate of how large -- you talked about a banner. Do you have any estimate of how large, how big of a presence that banner was?
A I'm going to say probably about 4 feet deep and 15 to 16

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feet long.
Q Do you have a memory of whether the banner was brightly colored?
A I remember the banner being brightly colored. I do.
Q Do you recall today what color it was?
A Like a bright yellow.
Q Did you yourself have to reduce the speed of your vehicle suddenly to avoid a collision?

A Yes, I did.
Q Do you have an estimate of what speed you were going before this developed on the Beltline?
A I was just keeping up with traffic at the time trying to merge into the lanes, so --
Q And how slow did you ultimately have to bring your car to control it and to avoid collision?
A Down to a dead stop before --
Q You were --
A Before the vehicles started to move again, yes.
Q You were completely stopped on the Beltline during rush hour?
A Yeah, because I was really worried about somebody hitting me in the rear end, too.
Q And so you were having your attention diverted. First there's a big sign and there's this stuff going on in the -- in front of you and you're worried about being rear-ended

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yourself.
A Um-hum.
Q Yes?
A Oh, yes.
Q You talked about vehicles weaving. Was this just one vehicle or a couple vehicles, or was this something more, more than that?
A It was more than one or two vehicles. As you can see in the number of vehicles that were there, there were numerous vehicles that had their attention diverted elsewhere.
Q What did you do in response to what you saw on the Beltline that day?
A I called 911.
Q And were connected -- Who did you get connected to then?
A Madison Police Department.
Q And what information do you remember that you

conveyed to dispatch?

A I told him there was an overpass, that there were people up there with a brightly colored banner. I could see people like yelling and waving their arms and vehicles were slamming on their brakes and weaving in their own lane of traffic. And I told them that it's a dangerous situation, that somebody's going to get hurt up there.

Q You said you saw people waving their arms. Do you mean the people on the overpass waving?

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A Yes.

Q Did the dispatch operator or the 911 operator ask you to provide a specific location where this traffic disruption was occurring?

A Yes.

Q And were --

A We tried.

Q Were you able to do that?

A No. I had to go down to the next ramp, pull off and come back and try and give her a description of where I was at, you know, what, you know, ramps I was on and where I just came off of.

Q And that's because you're not a resident of Madison and you're not all that familiar with the ramps?

A I'm not familiar with Madison at all.

Q Why did you take the added step of trying to circle back to identify the location where this was occurring?

A It was -- in my judgment it was a dangerous situation. Somebody was going to get hurt.

Q Based on what you saw out there on the Beltline that day, was the spectacle of the people and the banners and signs on the overpass having an adverse impact on traffic safety?

A Yes, it was.

Q Was your decision to call about your concern to dispatch influenced at all by the content of the message on

the banners?

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A No. I don't care what was written on the banner. All I know is that it was a situation where somebody was going to gethurt. And when I became a deputy in Jefferson County I took an oath to protect lives and property. And it doesn't matter if I'm in Dane County or in Timbuktu, I saw that there was going to be somebody endangered and property destroyed and that's why I made my telephone call.

MS. ROTTIER: That's all I have. Thank you.

THE COURT: Cross-examination.

MR. KELLUM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KELLUM:

Q Mr. Johnson, I'm sorry, you're a deputy sheriff, is that correct?

A Yes, sir.

Q And where is that?

A Jefferson County.

Q Okay. So you do not work with the City of Madison Police Department, is that right?

A No, I don't.

Q Okay. So you were not involved in the decision then to remove Ovadal from the overpass, is that correct?

A No, I didn't have any decision at all in that.

Q So basically you just saw a situation and you called it in, is that right?

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A Correct.

Q Okay. And I believe you referred to seeing some banners that were 4 feet by 15 to 16 feet long, is that right?

A Yes.

Q Okay. So then you and other people on the highway could read the message on that banner?

A If they were looking long enough, yes.
Q Now you were describing the braking. Is there a difference between slamming on brakes and dynamiting the brakes?
A Dynamiting is just something that we use when we're talking amongst ourselves at the department.
Q So in answering the question, is it the same or is it something different?
A Probably the same thing.
Q Okay.
A Slamming on the brakes and dynamiting them.
Q Okay. Then isn't it fair to say that some, if not all, of the individuals who were slamming on their brakes was because they were upset by the message?

MS. ROTTIER: Objection; calls for speculation.

THE COURT: Sustained. Lack of personal knowledge, Rule 602. You can read that if you want to continue.

BY MR. KELLUM:
Q Mr. Johnson, do you know why the individuals slammed on their brakes?

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A Probably because they were trying to see what the sign said. That's about the best I can say.
Q I would refer to Rule 602, speculation. I mean, do you know? Did you talk to anyone?
A No.

MR. KELLUM: I'd move to strike that answer, Your Honor, about the --

MS. ROTTIER: I think counsel invited the answer, but --

THE COURT: Yeah, once you ask a question like that and you don't know the answer and you get the wrong answer, it doesn't become stricken, Counsel.

BY MR. KELLUM:

Q All right, so -- All right, following up that. You do not believe that anyone would be upset by the message?

MS. ROTTIER: Objection; calls for speculation, beyond the witness' personal knowledge.

THE COURT: Sustained.

BY MR. KELLUM:

Q Did you talk to anyone in any of those vehicles?

A No.

Q To your knowledge did anyone in the Madison Police Department talk to anyone in those vehicles?

MS. ROTTIER: Objection; beyond the witness' personal knowledge.

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THE COURT: Overruled.

THE WITNESS: I don't have the faintest idea.

BY MR. KELLUM:

Q Okay. Did the signs cause you to slam or dynamite the brakes?

A No.

MR. KELLUM: That's all I have. Thank you, Mr. Johnson.

REDIRECT EXAMINATION

BY MS. ROTTIER:

Q What did cause you to slam on your brakes?

A The cars in front of me slamming on their brakes.

MS. ROTTIER: That's all. Thank you.

THE COURT: Recross.

MR. KELLUM: No, Your Honor.

THE COURT: The witness may be excused. Next witness.

MS. ROTTIER: We would call Officer Curt Fields, please.

THE COURT: The witness may come forward to have the oath administered to him.

CURTIS FIELDS, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MS. ROTTIER:

Q Could you give us your full name, please?

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A Curtis Fields.

Q In what city and state do you work?

A I'm employed by the City of Madison, Wisconsin.

Q All right. And are you a Madison police officer?

A I am.

Q How long have you been an officer with the Madison Police Department?

A Approximately 12 years.

Q What's your current assignment or position?

A I'm the Hammersley neighborhood officer.

Q Back in September of 2003 which police district were you working out of?

A The west police district.

Q And was your job title and function the same then as it is now?

A That's correct.

Q Okay. On September 2, 2003, the day after Labor Day, did you have occasion to be traveling on the Beltline in your own private vehicle?

A I did.

Q Do you recall, Officer Fields, what time of day that was?

A Approximately 4 p.m., a little after.

Q All right. Where had you started out and where were you headed?

A I started out in Stoughton, Wisconsin and I was headed to

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the west police district.

Q Could you describe the volume of the traffic on the Beltline as you were traveling that day?

A It was rush hour. The volume was pretty heavy. Things were moving along pretty well.

Q As you were driving on the Beltline did you notice anything unusual with respect to how traffic was proceeding?

A I did. I had to come -- I had to slow down and then come to a stop on the Beltline.

Q What did you notice was happening?

A That the other cars around me were doing the same thing. They were slowing down and stopping.

Q Prior to this slow-up -- well, first of all let me ask. Did you actually come to a complete stop on the Beltline?

A At one point, yes, I did.

Q Prior to the slow-up and the actual stopping on the Beltline had you been traveling at highway speed?

A I was.

Q Was it your observation that the cars around you headed in the same direction were also traveling at highway speed?

A That would be correct.

Q How much did you have to reduce the speed of your vehicle to deal with the slow-up ahead of you?

A Probably from 60 miles an hour down to 5, 5 or less and then stopped.

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Q Did you look around to see if you could determine what was causing the slowdown in traffic?

A Well, initially I thought it was a crash, which would be -- it's pretty typical driving behavior for a crash on the Beltline at that time so I was looking around for something to that effect.

Q Did you see a crash?

A I did not.

Q Did you see anything else that you concluded was the cause of the traffic slowdown?
A As you moved a little further up, as you inched forward, you could see the Beltline overpass and you could see a bunch of signs and things like that which later I determined to be the possible cause of the slow-up.
Q What's your estimate of the number of individuals you saw up on the pedestrian bridge overpass?
A I don't know. Maybe 10, 15.
Q And I think we know, but could you tell the Court which pedestrian overpass are we talking about here?
A The pedestrian overpass between Verona Road and Seminole Highway.
Q And you were traveling westbound that day?
A That's correct.
Q So it's after Seminole but right before Verona?
A That's correct.
Q Okay. Did the fact that the abrupt slowdown was occurring near the Seminole exit and the Verona Road exit cause you any particular concern?

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A That is one of our more notorious intersections for on and off traffic, because at the time you have one lane which is the far right lane which is an exit lane and sometimes people there would get a little -- a little confused. They'll be traveling in the far right lane and they'll want to get over and traffic was a little heavy, so it was a potential hazard, yes.
Q What did you conclude, Officer, was causing the abrupt slowdown in traffic?
A I would have to say the demonstration on the overpass.
Q Did you contact anyone to notify them about the situation that you were observing?
A I had my portable radio in the car with me and I got ahold of dispatch.
Q Okay. So is dispatch the same thing as calling 911?
A That's correct.

Q Okay. And when you reported what you were seeing happening on the Beltline what were you told to do?
A Well, at that point I had gone past the overpass. Speeds had picked up. I had to go over to Whitney Way because I couldn't get over. And at that point I was told by dispatch that they were receiving a number of other calls, near crashes occurring, people having to slam on their brakes calling in.

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So they asked if I could return back to the overpass and basically check on that situation.
Q What do you remember in terms of the number of signs that were part of the demonstration and the number of banners?
A I remember one large banner and a number of smaller signs.
Q What about the color of the banner? Do you remember that?
A It was a bright, bright color yellow. It was a yellow banner I think.
Q Do you remember the content of the message on the signs or banners?
A Something to the effect of Homosexuality Is Sin.
Q Was your attention to the demonstrators, the banners and the signs on the overpass drawn there by virtue of their message or drawn there by virtue of the spectacle created?
A I would say the spectacle. It's just something you're not used to seeing every day on the Beltline.
Q Do you know what time it was, Officer Fields, by the time you were -- well, let me establish this. After you called dispatch were you instructed to go back and gather more information, try to deal with the situation on the overpass?
A Yes.
Q Okay. Do you know what time it was by the time you were able to get your own vehicle turned around, parked and then up onto the overpass?

A It was probably 20, 25 minutes later I'd have to say.

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Q Do you know that there's a videotape that's been taken of events that transpired that day?

A Yes.

Q And if the videotape shows your first interaction with Mr. Ovadal being at 4:42 p.m., does that sound about right to you?

A That sounds about right, correct.

Q Did you speak with the person identified as the leader of the group of protestors on the overpass?

A I did.

Q And what was that individual's name?

A He identified himself to me verbally as Ralph Ovadal.

Q When you first went up to the overpass did you try to get Mr. Ovadal's agreement to move the protest to a better location, a less dangerous location?

A Yes.

Q And what did Mr. Ovadal or the other protestors, how did they respond to that request?

A They were -- they really didn't want to do that. They felt that that was a better place for them and their message. So they weren't readily wanting to move.

Q After your initial conversation with Mr. Ovadal did it become clear to you, Officer Fields, that he was not going to listen to your suggestion and voluntarily move the demonstration to a different site?

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A That's correct.

Q What did you do at that point?

A I contacted Sergeant Chris Paulson.

Q And you contacted him through what mechanism?

A Through my portable radio.

Q What was the purpose of contacting Sergeant Paulson?

A Make him aware of the situation, let him know what I was responding to and what exactly was going on with us on

the ground there.

Q What instruction did Sergeant Paulson initially give you as to how to deal with the demonstration activities on the overpass?

A Well, initially the instructions were that as long as there was a free pedestrian walkway where folks could walk across and that we weren't -- we weren't getting any more calls in, they should be allowed to stay on the walkway.

Q And let's just make this clear. This particular pedestrian overpass is just that. It's only for pedestrians. It's not for any vehicular traffic, correct?

A That's correct.

Q Upon receiving the advice from Sergeant Paulson to let the protestors continue and not interfere with them, did you convey that information to Mr. Ovadal and his associates?

A I believe I did, yes.

Q And what did you do then?

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A Myself and my backup officers left the scene.

Q How long would you say you'd been up on the Beltline overpass talking to Mr. Ovadal in that first instance before you left?

A Fifteen, 20 minutes.

Q If the videotape shows it's really that you left at about 4:50 and that it really was about eight minutes?

A Oh, okay.

Q Defer to the videotape on that?

A It wasn't a -- it wasn't a long period of time.

Q Okay. When you left the first time did your involvement in this incident end?

A It did not.

Q What happened next to continue your involvement?

A I would -- got back in my, my own vehicle, was heading back to the west police district and en route I got a call again to return back to the overpass because we were

receiving an increased number of calls stating that people had nearly gotten into collisions, crashes, what have you.

Q When you say in that answer, Officer Fields, that we were getting an increased number of calls, who's the we?

A The police department.

Q Okay. How long did it take you to get back to the overpass?

A I'd have to say about another 10, 15 minutes.

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Q When you got back to the overpass this time, and the videotape seems to show it was at 5:19 or 5:20 p.m., did you immediately order Mr. Ovadal and his associates off the overpass?

A I think -- I believe initially I spoke with them letting them know that we were possibly going to have to move this off the bridge at this point.

Q Did you appeal to his, Mr. Ovadal's concern for the greater good?

A I did.

Q What were you trying to accomplish with that?

A Well, what you have to understand about the Beltline is it can be a pretty hazardous place and -- we have crashes there all the time. Some of them are fatal. You want to prevent that from happening. And that's all -- that's all I was doing at that point was trying to say this is a potentially hazardous or fatal situation, can we just move it, move -- can we move this to another venue off the side or what have you.

Q When Mr. Ovadal indicated that his group was not inclined to voluntarily depart, what did you do at that point?

A I believe I got back in touch with Sergeant Paulson to let him know what was going on.

Q Did Sergeant Paulson tell you around that timeframe that he was contacting the District Attorney's Office for legal advice on how to proceed?

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A I believe that, yeah. Yes, that's right.

Q Did you relay that information to Mr. Ovadal?
A I did.
Q What's your understanding, Officer Fields, of why Sergeant Paulson wanted you to return to the overpass a second time?
A Public safety, public concern.
Q Did you communicate with Sergeant Paulson after he had spoken with the District Attorney?
A I did.
Q And what were your instructions following Sergeant Paulson's conversation with the District Attorney's Office?
A After, after his -- after Sergeant Paulson's conversations with the on duty DA at that point, I instructed Reverend Ovadal and his followers that they needed to exit the bridge.
Q And if they refused to exit voluntarily, then what?
A I was going to cite them.
Q For what?
A Disorderly conduct.
Q Was it your understanding that this direct -- First of all, did your order to make -- to issue the order to disperse, did that come from Sergeant Paulson?
A That's correct.
Q And it came from Sergeant Paulson after he had spoken with the Deputy DA?
A That's correct.

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Q Okay. Initially was it the plan that you would wait with the demonstrators on the overpass until Sergeant Paulson could get there and issue the order himself?
A Yes.
Q What happened to that plan?
A The traffic was so backed up that Sergeant Paulson couldn't reach us in a timely manner.
Q During the time you were up on the overpass with Mr. Ovadal and his associates did a counter-demonstration

develop?
A Yes, it did.
Q What did it consist of?
A Consisted of a small handwritten sign and two female protestors.
Q When you ordered Mr. Ovadal and his pro-- and his followers to disperse, did you also ask the counter-protestors to disperse?
A I did.
Q Did you agree that Mr. Ovadal could stay and be on the overpass if he put down his signs and he was just there not creating a spectacle?
A That's correct.
Q Officer Fields, in taking the actions you took on September 2, 2003 were you trying to squelch the message that Mr. Ovadal and his protestors were attempting to express?
A No, I was not.

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Q What were you trying to do?
A I was merely trying to prevent a possible hazardous or fatal situation.
Q Did you see people who were angry at that --
A I did.
Q Did you see an individual driver come up through her sunroof to gesture at the protestors?
A I did.
Q Was she angry?
A She looked angry.
Q Could you hear any of the words she said?
A No, I could not.
Q At that point when you saw some angry drivers, why didn't you get down in the Beltline traffic and go after them?
A Because I was dealing with this situation.
Q Would it have made any practical sense to try to go down on the Beltline and deal with upset drivers?

A Not at that point, no.
Q Why not?
A Well, it -- like I stated previously, the Beltline is a very hazardous place, especially during rush hour. In order for us to safely go onto the Beltline at any given time it's going to take a lot of officers to deal with that and we're limited on the amount of officers we have per shift.
Q Was it any kind of a practical possibility to go down there

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and direct traffic on the Beltline and let the demonstrators stay?
A So we would be directing traffic for this demonstration?
Q Kind of.
A That's very impractical.
Q Have you watched the videotape of the events that took place some two years and three months ago?
A I have.
Q Having seen the videotape are you aware that you said at one point that the banners and signs and the protest was causing a disturbance?
A Okay, I am.
Q Okay. What did you mean by that?
A I just meant that it was -- we were getting these calls for service, these near crashes and things like that. It was disturbing people trying to commute home or to or from work.
Q In your reaction to what was going on in the overpass that day, Officer Fields, were you taking action in response to the message the protestors were expressing?
A No, I was not.
Q Here's a hypothetical. If it's Bucky Badger and the UW marching band up there on the Beltline overpass in rush hour creating the same impact on traffic safety, how would you have responded?

A I would have told Bucky and the band and everybody else

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that they really -- they needed to move off there and take it off to the side.

Q Why?

A Because when you're creating a spectacle and people are look -- people are looking up, you're creating a traffic hazard.

Q At the time you interacted with Mr. Ovadal and his associates on September 2, 2003, were you aware as a Madison police officer of fairly longstanding of any established City policy that gave you specific guidance on how to deal with demonstrations on Beltline overpasses?

A I was not.

Q Had you personally ever come up against a situation like that in the past?

A No, I have not.

Q Have you ever since in the future -- or since then?

A No, I have not.

Q When you first spoke to Sergeant Paulson to get your marching orders, so to speak, did he reference any established City policy on dealing with expressive activities on the Beltline overpasses?

A He did not to me.

Q At some point as Mr. Ovadal and his associates were departing the bridge did Sergeant Paulson finally arrive?

A He did.

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Q Were you present when Sergeant Paulson spoke with Mr. Ovadal?

A I was.

Q Were his communications with Mr. Ovadal being videotaped?

A They were.

Q What message did you hear Sergeant Paulson try to

convey to Mr. Ovadal?

A The general gist of the message was is that we, we in the City of Madison and in particular in the Madison Police Department respect your First Amendment rights to free speech. However, you don't have carte blanche to just set up demonstrations anywhere you want to, especially when the public safety is of a huge concern as it was this day.

Q At the end of this long episode and the final conversation with Sergeant Paulson, what did you observe Mr. Ovadal do?

A He continued to ask Sergeant Paulson questions.

Q Okay. Did there come a point in time when he walked back up on the bridge with a flag?

A Oh, yes, he did.

Q And what did he do? He marched up on the overpass with the flag, went across once and then back across?

A That would be accurate.

Q And then what?

A And then he came back down and left.

Q Did you or any of the other police officers try to prevent

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him from marching across with the flag?

A No.

Q During the time you interacted with Mr. Ovadal on the overpass did he point out a nearby Hooter's billboard to you?

A He did.

Q What was the point -- purpose of his pointing that out to you?

A I believe the general content was that there were -- he and his followers with their banners and signs were no more distracting that the Hooter's billboard.

Q Do you drive down the Beltline frequently, sir?

A I do.

Q Does the Hooter's billboard disturb or distract your driving?

A To be perfectly honest with you, I don't even notice the billboards for the most part.
Q As you drove down the Beltline on this day did the spectacle of the demonstration cause distraction to the drivers that you observed around you?
A That's correct.
Q From your vantage point as a Madison police officer, Mr. Fields, does the City have a compelling interest in alleviating hazards to traffic safety on the Beltline?
A That would be correct.
Q How significant is the interest from your perspective?
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A It's -- I think it's paramount. When we run surveys in the City and you ask people about the number one complaint, it's usually not gangs and drugs, it's usually traffic. And we have established a test unit and we have CP -- we have community policing teams whose responsibilities are to deal with traffic situations also. Does that answer your question?
Q It does. Thank you. That's all I have.
THE COURT: Cross-examination.
MR. KELLUM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KELLUM:
Q Good morning, Officer Fields.
A Good morning. Actually it's more afternoon now.
Q I guess we are closing in on that. Now on September 2, 2003 prior to approaching Ovadal you were driving your own personal vehicle, is that correct?
A That would be correct.
Q And you noticed a slow-up in traffic, is that right?
A That's correct.
Q And so it was your assumption, you assumed that this was caused by the protestors, is that right?
A No, I initially assumed it was because of a crash.

Q Right. Initially it was a crash but then you assumed it was the protestors, is that right?
A That would be correct.

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Q And when you looked up at the overpass you saw signs, is that right?
A Yes.
Q And you could see individuals holding signs, is that correct?
A Correct.
Q And you could discern the content of signs from the highway?
A Well, I believe the banner I could. I don't -- I don't know necessarily the individual signs.
Q Now you recall certainly one saying Homosexuality Is Sin, is that right?
A General, yes.
Q From the highway? Is that yes?
A Yes.
Q Okay. Now when you saw them, the individuals were, and the signs were stationary, is that correct? Stationary?
A Oh, that's correct.
Q And you call dispatch and you report a protest on overpass, is that right?
A That's correct. I got -- I don't know what -- how exactly I phrased it, but I did call it in to dispatch.
Q And at that time dispatch had several people call in about the same protest, is that correct?
A I believe that they were calling in about near 1050s, and

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1050s are 10 code for crashes or near crashes.
Q Well, I believe according to the -- your actual report is there were several people who called in who were very upset in reference to the protest taking place on the walkway, isn't that right?

A Okay.
Q And you turned your vehicle around and returned to the protest site, is that right?
A I was instructed to, yes.
Q And I believe dispatch also called in backup, is that correct? I believe an Officer Cummings and an Officer Ortega-Mendoza, is that right?
A That's correct.
Q And you made contact with Mr. Ovadal and I believe Mike Foht as well, is that right?
A That's correct.
Q Okay. And Mr. Foht had a video camera and recorded your interactions?
A That's correct.
Q Please feel free to get you some water and let me know.
A Thank you. Okay.
Q And I believe you told Mr. Ovadal that he needed to take his protest somewhere else, is that right?
A I can't -- I can't remember the actual verbiage at that point.

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Q If that's you on the video transcript would you have any reason to question that? If that's shown on the video transcript would you have any reason to question that you told Mr. Ovadal he needed to --
A If -- if --
Q -- take his protest somewhere else?
A If you've got me on videotape saying it, then I said it.
Q I'm sorry, what's that?
A If I'm on video saying it, then I said it. But I can't remember the actual verbiage right now.
Q Fair enough. Do you recall informing Ovadal that the department had gotten several calls from disgruntled people?
A I remember saying that we were receiving calls. I may have used that word, I may not have used that word. I can't

remember at this point.
Q There again, if it's shown on the video you would have no reason to question that, is that correct?
A That's correct.
Q Okay. And that you told Mr. Ovadal, You're causing a disturbance, is that right?
A Is it on the videotape?
Q Yes.
A Okay. If it's on the videotape, then I said it.
Q I'm just asking if -- so you're saying you don't recall that either?

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A I'll tell you what. There was a lot said that day and I will recall as best I can what exactly was said at any given moment, but I can't give you my exact verbiage after all this time. I'll do my best for you.
Q I appreciate it. Do you recall telling Ovadal, If someone was disturbing you, you'd want me to do something about it, right?
A I remember saying something to that effect, yes.
Q And that his response to you was, Well, stopping speech because someone's disturbed, that's a heckler's veto. Do you remember that?
A I remember heckler's veto being mentioned, yes.
Q Okay. And when heckler's veto was mentioned you said, I don't care about a heckler's veto, to tell you the truth.
A Well, I think what I meant was that at that point I was more concerned about the public safety and driving conditions as what was occurring at that point and being up there.
Q But in response to the mention of heckler's veto what you said is, I don't care about a heckler's veto, to tell you the truth.
A Is that on videotape?
Q Yes.
A Okay. If it's on videotape I said it, but I'm giving you

the parameters under which I stated it.
Q I understand. And you confirmed to Ovadal that the reason
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why he would have to leave is because people called in and complained, is that right?
A Well, there's also the crashes and what have you. That was -- that was the more paramount concern.
Q There weren't any crashes, were there?
A There were some near crashes and people had to slam on their brakes.
Q But --
A And --
Q I'm sorry. But you're basing -- I mean, that's based on people calling in?
A Yes.
Q Is that correct? Okay. Now I believe initially as long as there were no crashes and the overpass was free and clear, you're going to back away, is that right?
A That's correct.
Q And then you were requested by dispatch to return to the scene, is that right?
A That would be correct.
Q And then you recontacted Sergeant Paulson and Sergeant Paulson informed of a major slow-up in traffic, is that right?
A That would be accurate.
Q Now were you aware at the time that there was an unrelated traffic accident in the vicinity?
A I don't think at that exact moment, no.
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Q Now certainly you wouldn't dispute that an accident can cause a slow-up in traffic?
A An accident, it certainly could.
Q Now as far as the individuals that were calling in, you did not talk to any of the callers, is that correct?

A No, I did not.
Q And you're not aware of any police officer talking to any of the callers, is that correct?
A Not that I'm aware of at this time.
Q Now you told Mr. Ovadal that there were at least 2 reports of near crashes, is that right?
A I said that there were near crashes. I don't remember what the number was.
Q But you didn't observe any near crashes, is that right?
A Well, I was on then walkway and I was dealing with that situation so, no, I didn't observe any near crashes.
Q And you were told by Mr. Ovadal, who was adamant, that he didn't observe any near crashes?
A That would be accurate also.
Q Now I believe you stated in your affidavit that was previously submitted that you say truthfully you told Mr. Ovadal that you had not seen any people nearly crashing in front of each other.
A No, I was talking to Reverend Ovadal at the time.
Q Certainly. But you had in your affidavit and you go on to

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say that during the time you were talking to Mr. Ovadal, however, you saw several people responding angrily to Mr. Ovadal, isn't that right?
A That would be correct.
Q In fact, you saw several people sticking their middle fingers up at Mr. Ovadal?
A That would be correct.
Q And you saw one woman while driving come up through the sunroof and scream obscenities at Mr. Ovadal?
A Didn't hear the obscenities but she did look angry.
Q And in your affidavit you actually do refer to it as obscenities, isn't that right?
A I may have. I'm sure she wasn't saying anything nice.
Q But if that's set forth in your affidavit, you have no

reason to dispute that, do you?
A I do not.
MS. ROTTIER: Do you have a reference, please?
MR. KELLUM: I'm sorry. Paragraph 16.
BY MR. KELLUM:
Q Now I believe also you noted trucks honking their horns in response, is that correct?
A That would be accurate.
Q And I believe you set forth in your police report that you saw some people acting irresponsibly and driving in a careless manner due to their outrage at Ovadal's signs, isn't that

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right?
A Is it in the report?
Q I guess first of all, do you recall that?
A I remember -- I remember some careless actions. I can't remember what my wording was in the police report right now.
Q Will you give me just a second? I'll see if I can find it for you, Officer Fields. I'd like to refer to --
MR. KELLUM: May I approach the witness, Your Honor?
THE COURT: Yes, sir.
BY MR. KELLUM:
Q This is page 3 of your report and that's the second paragraph, and it's the last sentence in that second paragraph. And if you could just read that last sentence of the second paragraph.
A I saw one -- I saw one woman while driving actually come up through her sunroof and scream obscenities at Ovadal and his parishioners. I was also present while Ovadal's parishioners would yell down to trucks as they honked their horns. Some people were acting irresponsibility and driving in a careless manner due to their

outrage at Ovadal's signs.

Q And this report was prepared, actually I guess the day following the incident, is that right, on September 3rd?

A I probably prepared it that night and it got --

Q Oh.

A -- typed the next day.

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Q So certainly these matters would be fresh on your mind at that time, is that correct?

A That would be correct.

Q And that's when you said that some people were acting irresponsibly and driving in a careless manner due to their outrage at Ovadal's signs.

A Okay. I say the signs but what -- the context I want you to place that in is the fact that I don't know what they're driving irresponsibly about. I have no way of discerning that at that point.

Q But that's what you put in the report?

A I did put it in the report but I'm just -- I'm letting you know that I have no way of knowing what they're outraged about. To the best of my knowledge they're outraged because they can't get to or from work in a timely manner because of the slow-up.

Q But that's not what you say in the report.

A Okay. I'm just giving you -- I'm giving you what's going on in my head at that time.

Q But that's what you're saying now is about it could be something else, correct?

A Correct.

Q Now in dealing with the situation, I think you already testified about this on direct, you did not approach any of the reckless drivers, is that right?

A That's correct.

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Q Or, for that matter, call to somebody else at the dispatch and say, Hey, you need to do something about these

reckless drivers, isn't that correct?

A That would be correct.

Q Now I believe Mr. Ovadal was asking you why his and your own observations about not seeing any near crashes should not be given as much weight as these called-in complaints, is that right? Do you remember that discussion?

A I remember something to that effect, yes.

Q And I believe Mr. Ovadal also asked if this restriction you're applying to him would apply to a labor picket. Do you recall that?

A He may have said that. I don't remember specifically, no.

Q Now you've seen the video recently, correct?

A I have.

Q And you've seen the -- Have you seen the transcript of the video? Have you read that?

A Yes.

Q And then on page 28 on I guess lines 1 through 3 you say to Mr. Ovadal, I'm not talking about labor picket. I'm talking about you.

A Okay. I recall seeing that. But what I was referring to was I'm dealing with this situation right now. I'm not dealing with a labor picket, I'm dealing with what's going on at this present time.

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Q But that's not actually what you said. I mean, what you said is, is I'm not talking about labor picket. I'm talking about you.

A But I'm giving you the context under which it was said. It had nothing -- I didn't even know Reverend Ovadal at the time. It had nothing to do with him. It had everything to do with me dealing with that particular situation at that moment in time.

Q I'm just asking you --

MR. KELLUM: And I would move to strike that as nonresponsive.

THE COURT: So ordered, but it's clear in the transcript at page 28. How much do you have to spend to take over two lines?

MR. KELLUM: Understood.

THE COURT: How much time do you need for that?

MR. KELLUM: Not -- no more as a matter of fact, Your Honor.

THE COURT: Good idea. This is all here. Read all by the Court. Part of an exhibit. You've both done it. This is called cumulative all the way, but keep on going and see if we can break the record.

BY MR. KELLUM:

Q Officer Fields, in your presence do you recall Officer Cummings informing Ovadal that -- of course Officer Cummings was there with you, is that correct?

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A He was one of my backup officers, yes.

Q And he informed Ovadal that his protest was okay until he started harassing people and making them feel uncomfortable.

A I -- Okay. What do you want?

Q Do you recall that?

A I recall seeing it. I don't recall -- I mean, you'd have to bring Officer Cummings in here to speak of her own statement.

Q I understand, but I'm asking you. I mean, you were there. I mean, do you recall it being said?

A I was there. I remember her being there talking to people. I remember her saying something but I don't specifically remember what.

Q Now finally you order Mr. Ovadal off the bridge under the threat of arrest, is that correct?

A That's correct.

Q But you let Mr. Ovadal know that the problem is not his presence, that he would be free to come without the

signs. Isn't that right, that he could be on the bridge without the signs?

A Correct.

Q Now you were present when Mr. Ovadal had his discussion with Sergeant Paulson about the situation, is that right?

A I was there, yes.

Q And do you recall Mr. Ovadal asking Mr. Paulson if he could

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speak on that particular overpass at any other time?

A I remember something to that effect, sure.

Q And your understanding was that Mr. Ovadal could not set up a protest on that particular overpass or any other overpass within the City of Madison?

A I believe that that's an accurate statement.

MR. KELLUM: That's all I have. Thank you, Officer.

REDIRECT EXAMINATION

BY MS. ROTTIER:

Q Two very, very quick questions. Is it typical when you get -- when police get lots of calls into dispatch about a traffic concern, that before addressing the concern you call up the callers to find out what they have to say and to interview them?

A No, it's not. We respond to it.

Q Would that be an appropriate way for the police to respond to respond to a situation like this?

A No, it would not.

Q And secondly, in terms of your knowledge of what safety hazard was being created, partially it was based on calls that were coming in, is that right?

A That's correct.

Q And partially was it based on what you observed

yourself while you were on the Beltline?
A That's correct.

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MS. ROTTIER: Okay, that's all I have. Thanks.

MR. KELLUM: Nothing further, Your Honor.

THE COURT: The witness may be excused.

THE WITNESS: Thank you, Your Honor.

THE COURT: And the defendants may call their next witness.

MS. ROTTIER: I'll call Deputy District Attorney Judy Schwaemle, please.

THE COURT: The witness may come forward to have the oath administered to her.

JUDY SCHWAEMLE, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MS. ROTTIER:
Q State your full name, please.
A My name is Judy Schwaemle.
Q And in what city and state do you live?
A I live in the City of Madison, Dane County, Wisconsin.
Q How are you employed?
A I work in the Dane County District Attorney's Office.
Q What is your particular position in the District Attorney's Office?
A I'm currently a Deputy District Attorney. I've been a Deputy District Attorney for 10 years. I've worked in the District Attorney's Office since 1983.
Q All right. From what law school did you graduate and in

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what year?

A The University of Wisconsin Law School in 1983.
Q So all of your legal career has been with the DA's Office here in Dane County?
A That's correct.
Q Did you happen to be at work on duty as a Deputy District Attorney on September 2, 2003, the day after Labor Day?
A I believe so, yes.
Q Okay. Did you receive an inquiry from a City of Madison police officer about how to do deal with a specific situation that was taking place on a Beltline overpass that day?
A I did. I was in my office and Chris Paulson from the Madison Police Department called me with some questions about what officers could do or could not do regarding a demonstration on a Beltline overpass. His specific concern was whether or not given the demonstrators' rights to demonstrate law enforcement could do anything about reports that had been received regarding motorist safety.
Q What advice did you give Sergeant Paulson after gathering enough information to come to an opinion?
A I told Chris Paulson that if he or other officers observed genuine traffic hazards were being created by this demonstration, then they could ask the demonstration to move, to relocate so as to avoid creating a traffic hazard.
Q Why did you conclude that it would not violate the First

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Amendment rights of the protestors if the police asked them to relocate in order to avoid a continuing traffic hazard?
A Actually my advice was sort of based on my -- on common sense, in a sense my common sense that a right to expression, to free expression is tempered by public safety and has to be tempered by public safety, and that's why I gave the advice I gave.
Q At the time you gave this advice to Sergeant Paulson

had you been an attorney with DA's Office for a full 20 years?

A Yes, I had been.

Q Okay. Do you stand by the advice you gave Sergeant Paulson that day?

A I do.

Q And did you understand that Sergeant Paulson was calling you because he was going to rely on your legal input in determining how to handle this situation?

A I did understand that that was the nature of his call, yes.

Q Were you trying to give him the best legal advice you could?

A Yes, I was.

MS. ROTTIER: That's all I have. Thank you.

THE COURT: Cross-examination.

MR. KELLUM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KELLUM:

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Q Hello, Ms. Schwaemle. So as I understand, you understand that the protestors had a right to protest. Is that right?

A Oh, yes.

Q And so the concern was public safety?

A Yes.

Q And so if there were some safety concerns it was your opinion, I guess what you advised Sergeant Paulson is that the protest would have to be restricted in some way, is that correct?

A My advice to Sergeant Paulson was that if he or other officers had knowledge of specific hazards or traffic hazards created by the demonstration, that they could ask the demonstrators to move to a different location where traffic

hazards were not being created -- would not be caused.
Q I understand. So if the protest, if the expression was causing public safety problems, then Sergeant Paulson had the right then to remove them to an area that would be safer, is that correct?
A To ask them to leave, yes.
Q Yes.
A To a different location.
Q Thank you very much.
A You're welcome.

MS. ROTTIER: That's all.

THE COURT: The witness may be excused. Defendants

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may call their next witness.

MS. ROTTIER: We call Sergeant Paulson, please.

CHRISTIAN PAULSON, DEFENDANT, SWORN

THE WITNESS: I'm going to kill myself here, Judge. All right.

THE COURT: It's happened before.

THE WITNESS: Okay. All right.

DIRECT EXAMINATION

BY MS. ROTTIER:
Q Would you state your full name?
A Christian Gordon Paulson.
Q In what city and state do you live?
A The City of Madison, Wisconsin.
Q Are you currently employed by the Madison Police Department?
A I am.
Q And what is your current rank?

A I'm a police sergeant.
Q How long have you been a sergeant?
A Since 1997.
Q How long have you been with the police department in any capacity?
A Since May of 1990. Approximately 15 years.
Q Fifteen years. On the late afternoon and evening of September 2, 2003, the day after Labor Day, were you on duty?

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A Yes.
Q In what capacity were you on duty that afternoon and evening?
A I was working as a patrol sergeant working our second detail which is 3 p.m. to 11 p.m.
Q Is a patrol sergeant also called sometimes a supervisor in charge?
A I -- a supervisor, they're two different things there, but, yes, I was a supervisor assigned to work specific districts and that night I was assigned to work the south and west police districts.
Q Just as a little overview, can you tell the Court how many police districts are there in Madison?
A The City of Madison is broken down into five police districts. We operate with two different radio channels from 3:00 to 11:00, so I was on radio channel 3 covering south and west as the supervisor.
Q For that particular shift on that particular day were you the go-to person for decisions that would be made by officers in the field in the south and west districts?
A Yes.
Q And how large, how large a population of the city is that covering?
A In excess of 100,000.
Q As to events happening in the south and west sectors during

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your shift that day, were you the final decisionmaker on how a particular incident was going to be handled?

A On -- Yes.

Q Okay. During part of your interaction with Mr. Ovadal on September 2, 2003 I think you said something about there being no lieutenant or captain for you to contact. Do you remember saying something like that?

A Yes.

Q What did you mean by it?

A There were -- there was no lieutenant or captain working the street at that particular time. We do have what's called a shift commander that works up in the City-County Building. However, that person often is at the same rank that we are as a sergeant covering that office.

Q Now, Sergeant Paulson, the fact that you had decision-making authority for particular incidents that happened that evening, did that give you policy-making authority for the police department in general?

A Absolutely not.

Q Can you explain very quickly the difference, the distinction between policy-making authority for the department-wide and the authority you had that day as you understood it?

A Well, ultimately the Chief of Police has policy-making authority. I certainly as a patrol sergeant do not have that. I think as a patrol sergeant you interpret policies and

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procedures enacted and you monitor and supervise specific incidents.

Q Sergeant Paulson, how did you first become aware of an issue or an incident involving people protesting on a Beltline pedestrian overpass that day?

A I heard Officer Curt Fields call on our channel 3 requesting a supe[illegible]isor on another channel.

Q What information was conveyed to you from Officer

Fields about the situation when you first learned of it?
A When I first learned of it, Officer Fields informed me that there was a demonstration occurring on a bridge on the West Beltline Highway. He informed me that he had actually observed this himself as he was en route to work. He told me that we had received a couple of calls reference the distur-- or reference the protest that was on this bridge.
Q And what were your initial instructions to Officer Fields on how he should proceed?
A I initially inquired as to whether or not the protestors were obstructing the pedestrian overpass. I clarified with him that this was the pedestrian overpass on the West Beltline Highway between Seminole Highway and Verona Road. And Officer Fields informed me that the -- that the protestors were not obstructing the pedestrian overpass, and collected a little more information on him on the seriousness right at that time on what he was observing at that particular time, how many

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calls we had. And I told him at that particular time that unless we were seeing -- he wasn't seeing any more than he was seeing and/or we hadn't gotten any other calls, that we would allow the protest to continue and allow whatever the protest group was to continue.
Q At any time while you were dealing with the situation as it developed that day were you aware of any established City policy, formal City policy on dealing with expressive activity on overpasses?
A No.
Q Is it generally your policy and the policies of the officers under your command to respond to situations of danger that they either observe personally or are reported to them?
A Yes.
Q Was it you who ordered Officer Fields to make contact with the protestors or was it dispatch that did that initially?

A Dispatch initially.
Q And I understand from your prior answer that your first decision was to make sure the protestors were leaving the overpass walkway free for other pedestrians and then essentially to let them be, is that right?
A Yes.
Q After making that initial decision did something happen that caused you to rethink it?
A Yes.

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Q What?
A I received a call from dispatch informing me that since Officer Fields and Officer -- the other officers that he were with had left the first time, I was informed that dispatch had fielded approximately 12 calls from people calling the 911 Center reference this protest.
Q And what was the nature of the calls? What were the people reporting?
A I checked with the dispatcher and I asked specifically what were the calls and was told that people were calling advising that there was a traffic snarl and that there was a traffic hazard, that multiple people were concerned about the safety of motorists traveling on the West Beltline Highway as a result of the protest that was occurring on this pedestrian overpass.
Q As a result of hearing from dispatch about the additional number of calls coming in, what order did you make to Officer Fields at that point?
A Well, I immediately told dispatch to have Officer Fields and the officers go back to the pedestrian overpass.
Q What were you hoping to accomplish by sending him back there?
A Well, I -- I believe I even told Officer Fields to inform the leader of the protest that we had received multiple calls now and to continue to appeal to find out if he would voluntarily leave the bridge. In addition, I wanted to get

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Officer Fields' observations upon his arrival and I also wanted to -- well, that's what I was -- end.
Q Once Officer Fields was back on the bridge the second time and he had had an initial conversation with Mr. Ovadal, the leader of the protestors, and it didn't look like he was going to voluntarily depart, were you back in contact with him?
A Yes.
Q And at some point in here did you decide to call the DA's Office?
A Yes.
Q Why did you do that?
A I did that to -- the on-call DA I use fairly regularly in situations that I know there are going to be legal issues. I knew that the officer was back with the protestors and felt that I had time to just seek a legal opinion because I knew that there had been other -- again, with the protest and stuff I just wanted to seek some legal advice on whether or not disorderly conduct was potentially a charge as well.
Q Were you soliciting advice from the District Attorney's Office on whether the police had the right under the existing law to take action to disband the protest if it continued to cause a traffic hazard?
A I felt comfortable that we had the right prior to the call. I was simply attempting to clarify our legal authority so I had a little better grasp, but I felt prior to it that we had the
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right to do it. I felt afterwards that we had the right to do it, and again I just wanted to clarify a little bit.
Q Did the advice that the Deputy District Attorney Schwaemle give you confirm your understanding that the City didn't have to sit there with its hands tied behind your back while a traffic hazard continued?
A Absolutely.
Q Were you guided by the legal advice that you received

from the DA's Office in your further decision-making that evening?

A Yes, it helped.

Q Was it your intention, Sergeant Paulson, to try to get there yourself to deal with the situation directly?

A Yes.

Q Did anything prevent you from getting there as quickly as you wanted?

A Yes, I was stuck in traffic myself trying to get on from John Nolen Drive.

Q After speaking with the DA and in light of the traffic snarl that you yourself were caught in, what did you ultimately instruct Officer Fields to do at the scene?

A Well, I wanted -- I instructed him to have the group removed from the bridge.

Q When you finally got there --

A Yes.

Q -- were the protestors still on the overpass or were they [178]

off of it?

A No, they were off.

Q Where did you interact with Mr. Ovadal?

A On the frontage road, Beltline frontage road just south of the pedestrian overpass.

Q Did you understand that your interactions with Mr. Ovadal were being videotaped?

A Yes.

Q Was he pressing you for answers to numerous questions?

A Yes.

Q Were you attempting to respond to his questions?

A Yes.

Q At one point the videotape indicates you said something about the police response being venue-based. What did you mean by that response?

A I was attempting to let Mr. Ovadal know that this

particular pedestrian overpass is over a six-lane freeway or three lanes divided on either side and that this particular stretch of Beltline has that -- that merger ramp that goes off onto Verona Road which is the right lane. That this is an area that you come up over a small hill, crest a hill and this is a particularly dangerous stretch of Beltline highway and that as a result I felt that the protest was creating a substantial traffic hazard for the motorists that were heading home that day.

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Q What do you recall telling him about whether he and his followers were allowed to go back up on the Beltline overpass they had just departed?

A In reference to the flag or --

Q No.

A No? This is --

Q Did you tell them they could -- Did they ask if they could go back up on that very overpass they had just left?

A Mr. Ovadal continued to press and ask questions specifically about what hours, what time, 2 a.m. in the morning, and I was intentionally vague with Mr. Ovadal at that particular time.

Q Why do you say that intentionally vague with him?

A We had already spent well over an hour on this situation. There were three out of eight officers that work the west district were tied up on this call. It was my belief that Mr. Ovadal would simply -- we could stand and talk all day. We wouldn't have enough answers for him. And I knew that he was attempting to try to pin me down on specific, you know, whether or not the City of Madison has policy. I think he brought up that the Town of Madison had been in a lawsuit, and I frankly at that time was attempting to resolve this situation as quickly as possible with an explanation of why we were doing what we were doing but I didn't want to get locked into this never-ending debate and I felt that that's what was going on.

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Q Did you have a concern that Mr. Ovadal was going to take the protest activities and move it one overpass down the Beltline and start up again?

MR. KELLUM: Objection; leading.

THE COURT: Sustained.

BY MS. ROTTIER:

Q Did you have any concerns about what further activities Mr. Ovadal might take that evening?

A I was very concerned that, yes, we would be either on the Beltline overpass, the pedestrian overpass that was east of Park Street or the pedestrian overpass that is out near Whitney Way. And I felt that with the traffic volume the way it still was that 10 minutes to get over to the next overpass we would have another three to four officers tied up assessing the same situation with the same traffic hazard that was in place.

Q Sergeant Paulson, the videotape indicates that on several occasions you said to Mr. Ovadal that this was your decision. You seemed to emphasize that.

A Yes.

Q Why were you doing that?

A A couple of different reasons. I felt from the get-go that this would be an Internal Affairs complaint. I felt that the office -- I wanted the officers there to not be left out on a, on a -- on a limb. I wanted them to know that they had -- that this was my decision. So -- and I wanted to convey that to

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Mr. Ovadal to let him know that there was not a City policy, that this was a specific incident that I was attempting to deal with and I was attempting to convey to him that I believed that citizens in the City of Madison were put at risk by these banners and what had been described to me.

Q Did you suggest to Mr. Ovadal that there were other places in Madison where he could express his religious and

political views?
A I believe I did.
Q Why did you make that observation?
A Well, I made that observation because I felt like Mr. Ovadal was -- had specifically said that this was the first time that this had happened and that clearly I as the supervisor speaking on behalf of the Madison PD was intending to stem his freedom or his First Amendment right of freedom of speech, and I was trying to convey to him that that is not the case, that there were many other areas here in the City of Madison that a protest could occur without a traffic safety hazard being created where we might have a serious injury or fatal injury accident.
Q Sergeant Paulson, was your response to the situation that evening at all content-based?
A Absolutely not.
Q Why do you say that?
A I gave Mr. Ovadal the analogy, and I apologize for wiggling

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around here but my back is killing me because I was at a Green Bay Packer game last night.

THE COURT: Gee, I thought it was the chair.

THE WITNESS: Oh, no, it's my back. It's killing me. But I'm a huge Green Bay Packer fan and I told Mr. Ovadal that again if people were up on that Beltline overpass walking back and forth with banners or hanging banners and we got the number of calls we got from dispatch and we had people reporting a safety problem and I have an officer telling me that he himself had observed a problem through his own deduction he believed was created by this particular protest, I would do the exact same thing. I would tell those, you know, whoever is up there, they need to get off the bridge because there's a traffic problem and I don't want people to get hurt.
BY MS. ROTTIER:

Q One more example for you as a hypothetical. If this had not been an anti-homosexuality protest but instead a pro-gay rights demonstration causing the same traffic snarl with the same complaints of near accidents and slamming on brakes, would your response have been any different than it was in this occasion?

A No, not at all.

Q Sergeant Paulson, did you consider as an alternative approach allowing the demonstrators to maintain their position on the overpass with their signs and banners but then sending

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police officers down on the Beltline to direct traffic?

A Did I consider that?

Q Yeah.

A No.

Q Why not?

A It's -- I mean it's almost absurd in that anybody that's lived in the City of Madison knows that that Beltline is as close to a freeway as we have and to -- to get people out there, to have actual officers out on the Beltline on a regular accident in that hour takes four to five minimum to try to get traffic slowed down. I had eight officers that were working the west district at that time, again a population close to 100,000 people. We had three of them up on the bridge with me. Five others were responsible for the rest of that population. I didn't -- we didn't have the resources to deal with that, nor would it have been prudent or safe to be able to allow that to happen.

Q What was it about the situation you were dealing with that led you to believe it could trigger application of the disorderly conduct statute?

A Well, I believe the -- I have always interpreted the disorderly conduct statute as circumstances which tend to cause or provoke a disturbance and that within that is a category of other, profane, boisterous, a variety of

characteristics, but I felt that this did fall under circumstances which tend to cause

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or provoke a disturbance, i.e., this -- this dangerous situation on the Beltline.

Q Near the end of your conversation with Mr. Ovadal that night, did he talk to you about the fact that both your fathers had served in the military?

A Yes.

Q And then did he ask you if he could walk across the bridge with the American flag?

A Yes, he did.

Q And did he ultimately do that?

A I took Mr. Ovadal at his word that he would walk across the overpass one time and that that would resolve this situation without citations, without arrest. Did I feel at the time that he was attempting to try to prove a point that this was content-based? I did believe that at the time. However, again I was attempting to resolve this situation. If we had to arrest 15 people it would have tied up not only those three officers but other officers. So I looked at Mr. Ovadal. I believed him that he was going to walk over once and back, and I felt that the least restrictive, quickest way to resolve this situation was to take him at his word and that's how this did resolve. And he agreed voluntarily to do that and then voluntarily agreed to leave with his group.

Q Sergeant Paulson, I want to ask you one other hypothetical here, a different one. Same number of people up on the same

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Beltline overpass with the same signs and banners but this time no reports of near crashes, no reports of cars slamming on brakes, no reports from your own officer of significant slowdowns in traffic. Would you have ordered action taken to remove the protestors from the overpass?

A Absolutely yes.

Q You would have ordered them to be removed if there were no traffic hazard?
A Oh. Okay, strike. I misheard your question.
Q That's all right. Let's --
A Can you repeat it, please?
Q Let's just make --
A Okay.
Q -- sure we're on the same page.
A Okay. Please repeat.
Q I want to give you the same setup in terms of the people on the Beltline.
A Okay.
Q The same signs and banners but this time no reports of traffic slowdowns, no reports of slamming on brakes.
A Um-hum.
Q No reports of near accidents, no reports from the officer that he himself has been caught up in it. Then do you order them off?
A Absolutely not is what I should have said and that's what [186]
I --
Q And tell me why just so that we get it clear.
A Because the whole reason we were there was the calls to dispatch, the observations and what dispatch was telling me citizens were saying, that there was a -- imminent accidents about ready to happen.
Q In terms of what citizens were calling in and reporting to dispatch and then dispatch reporting to you, were you concerned about whether the callers were upset with the message or upset with the traffic snarl, or how did you handle that?
A I was cognizant of that, yes. I was cognizant and wanted to make sure that this was relevant to a traffic problem, a traffic hazard as opposed to callers calling in upset with signs. I was cognizant of Mr. Ovadal's First Amendment right and felt that I was in a position that I had

to balance Mr. Ovadal's First Amendment right with the police duty to protect public safety.

Q Finally, Sergeant Paulson, just a short line of questions to clear up something from the deposition you gave in October of this year. You were asked whether you had discussed the Ovadal incident with anyone else in the police department and I think you mentioned that you had spoken to Sergeant Patrick Grady about that. Do you recall saying that?

A Yes.

Q What's your best memory now about when your conversation

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was Sergeant Grady regarding Mr. Ovadal occurred, before his own involvement or after it?

A Well, I can honestly say I don't know for sure. Sergeant Grady would have a better handle perhaps on when that occurred. I can tell you that I have had a chance since the deposition to review the videotape of the October 11th, 10th incident involving Sergeant Grady and after looking at Sergeant Grady's interaction with Mr. Ovadal, it appears to me readily apparent that Sergeant Grady had not talked to me at that particular time. But I did have a conversation with Sergeant Grady. In looking at the videotape it looks to me like Sergeant Grady had no knowledge prior to his interaction with Mr. Ovadal on -- you said October 11th?

Q Right.

A On October 11.

Q In your 15 years with the department have you seen other people holding signs and banners on pedestrian overpasses on the Beltline?

A Yes.

Q Have you had any other occasions where an officer under your command reported that signs and banners were being displayed on an overpass so as to create a traffic hazard?

A No.
Q Have you ever ordered signs or banners removed from a Beltline overpass when they were not creating a safety hazard?

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A No.
Q Sergeant Paulson, do you believe that the City of Madisonhas an interest in protecting traffic safety on the Beltline?
A Yes.
Q How important is that City's interest?
A It's incredibly important, and what I told Mr. Ovadal at that particular day or what I tried to convey was that someone not even involved in interpreting anything that's up there can be involved and be in an accident. And I've been a supervisor on at least four fatal accidents out on that Beltline. So it's incredibly important seeing the damage serious accidents cause.

MS. ROTTIER: That's all I have. Thank you.
MR. KELLUM: Thank you, Your Honor.
THE COURT: Cross.

CROSS-EXAMINATION

BY MR. KELLUM:
Q Hi, Sergeant Paulson.
A Hi.
Q Now in September of '03 you were a shift sergeant and I guess you still are a shift sergeant in the south district?
A I am patrol sergeant assigned to the south police district.
Q Then I guess from time to time your duties would include supervision of the west, is that right?
A In 2003 our minimum was still three supervisors out on second detail. The way it's currently configured is there are

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four supervisors, so the west district now does have an assigned patrol supervisor. The reality is if there's a call west or south it -- easily one supervisor could have a large geographical area to patrol.

Q Now initially I guess on September 2nd, '03 you get a call from Officer Fields and that's your first information about this incident, is that right?

A Yes.

Q And at that point Officer Fields tells you about the content of the signs?

A Yes.

Q And you were informed that one proclaiming Homosexuality Is A Sin, is that right?

A I believe so, yes.

Q And in that conversation Officer Fields refers to a traffic snarl that's going on. Is that right?

A A traffic what?

Q Snarl.

A I think that it was something similar to that, yes.

Q Now I believe in your analysis of it initially, even with that information about a traffic snarl, as long as there was no blocking the traffic on the overpass itself and no serious complaints you're going to let the demonstration continue, is that right?

A Ab-- Yes.

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Q Now dispatch I think at some point informed you of receiving more calls.

A Yes, they did.

Q Is that right?

A Yes.

Q And I think we talked about this during your deposition, and tell me if I'm correct about this, that basically dispatch overhears everything you're saying with Officer Fields, is that right, and then they sort of, Hey, Sergeant

Paulson, I want you to let -- I want to let you know about more calls.

A Yes.

Q Is that right?

A Yes.

Q And so you instruct Officer Fields to go back to Mr. Ovadal and tell him to leave with the signs under the threat of arrest, is that right?

A Ultimately, yes.

Q Now in making this decision to remove Ovadal and his signs, as I understand it you relied on the additional calls and Officer Fields' observations.

A Yes.

Q Is that right?

A Yes.

Q And Fields observed a traffic snarl?

A Yes.

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Q And yelling?

A Yes.

Q On the highway, and also honking of horns. Is that correct?

A Yes.

Q And now as for the calls, there were a couple reports of near crashes, is that right?

A Yes.

Q And there also included some complaints that were directly about the message, isn't that right?

A I have not looked at each of the dispatch calls there.

Q Okay.

A At that particular time. I'm not saying that they didn't come in. They may have. My conversation with dispatch was reference how many calls have we had reference the traffic problem and what are the callers saying.

Q But if dispatch reports show some complaints about the message, you certainly don't dispute that those

complaints came in?
A Not at all. That record would be accurate.
Q So the complaints consisted of people either complaining about the message itself or a traffic hazard created by people displaying the message, is that right?
A Well, I think -- and the word's been used multiple times today, the way I interpreted it was a spectacle, and I know

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that word's been used, but a -- I believe that in the totality of the circumstances, the banners in conjunction with the people, the waving, the honking of horns, created enough of a spectacle that it did pose a traffic safety hazard.
Q Now when I asked you about this in -- Do you remember my taking your deposition?
A You bet.
Q Now you didn't mention the word spectacle at that time.
A No, I did not. I learned that today, or I heard it today.
Q I understand. As far as reports of near crashes, and you've talked about this, there was no follow-up with any of these callers, is that correct?
A That's correct.
Q And we talked about this during the deposition as well, but if there's no follow-up with any of the callers --
A Um-hum.
Q -- you can't really judge the veracity or the truth of whether or not there were actual near crashes, isn't that right?
A That's correct.
Q Now as far as Officer Fields' observations, I mean one was the traffic snarl. Now you were aware, I guess at least now, are you not, that there was actually an accident in that vicinity at that time that was unrelated to the protest?
A I'm aware there was an accident.

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Q Okay.

A I am not aware of what the cause of that accident was or wasn't.
Q Sure. Do you have any knowledge it was related to the protest at all?
A I have no knowledge that it was related and I have knowledge that it wasn't related.
Q Fair enough. Now a traffic accident could cause a traffic snarl, correct?
A Yes.
Q Now I believe also another thing as far as Officer Fields' observations that you're relying on was yelling from vehicles and honking horns. Is that right?
A Yes.
Q Okay. Now, so honking horns was a factor because people had their attention drawn to the message, is that right?
A I took that to mean that the honking of horns from truckers and vehicles indicated to me how I took the information that Officer Fields provided me and what that assisted me in, that indicated to me that this was unusual, I mean, I think that was described in earlier testimony from another person, this was an unusual circumstance that was drawing people's attention and that's how I related some of the honking of horns, if that makes sense.
Q Well, they had their attention drawn to the banners,

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correct?
A Correct, which takes their roads [ph] off the highway.
Q So you go to the scene yourself and you meet Mr. Ovadal below the bridge, is that right?
A Yes. Yeah, he was off by then.
Q And you were aware at that time of being videotaped, is that correct?
A Yes, I was.
Q And you confirmed to Mr. Ovadal that he would be arrested for failure to leave the overpass with the signs, is that right?

A I believe I attempted to convey that, yeah, decisively.
Q And, now Mr. Ovadal, he tells you that he didn't observe any near crashes, isn't that right?
A That is correct.
Q And I believe your response to that was, well, it's your decision to make and you made a decision, is that right?
A That's correct.
Q And then I believe Mr. Ovadal also asked if he could just show signs in the slow moving traffic about five miles per hour and I believe your response to that was you made a decision. Is that right?
A That's correct.
Q And I believe Mr. Ovadal also mentions concern about the complaints being anonymous and could not be verified and I

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believe your response to that was it's your decision and you're not changing.
A Absolutely.
Q Now Mr. Ovadal asked if he could speak to a lieutenant or captain about the situation, is that right?
A Yes, he did.
Q And you specifically said there is no captain, it's your decision.
A Words to that effect, yes. None working, something similar to that.
Q Well, actually I mean you say specifically there's no captain.
A Okay. Yeah, I did.
Q And as far as the lieutenant, no, again, your -- it's your decision to make. Is that correct?
A That's what I conveyed to him several times, yes.
Q Now I believe, and you talked about this on direct, there was some complaint from Mr. Ovadal about, well, this seems content-based to him. Is that right?
A Yes.

Q And you said you didn't view it that way, and that's when you made the analogy about the Green Bay Packers.
A Correct.
Q Is that right? So if I understood your point there is that you're a big fan of the Packers and so there's no personal
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animus that's involved in this decision. You like the message of the Packers so it has nothing to do with whether or not you like Mr. Ovadal's message or not. If the Packers message is causing a safety hazard, you'd remove that too. Is that correct?
A If I -- if I stuck with your thought to mean, that is an accurate analogy that I was trying to make. I was trying to show him that this isn't content-based.
Q It has nothing to do with how you personally feel about the message, is that right?
A Not only how I feel about the message because the reality as a police officer is I'm paid to not interpret messages and try, you know, to be fair and interpret the Constitution as fairly as possible. But what I was trying convey to him is the Green Bay Packers stand for Wisconsin and so anybody can -- if the people are causing a traffic hazard by seeing Green Bay Packers things, they would be removed. So not my own personal beliefs.
Q So if there's a rush of Chicago Bear fans and that caused a problem, you'd do something about it? Is that right?
A Correct. If there's a -- Yeah, if there's a traffic hazard on a freeway that's moving 65, yes, I would do something.
Q Now I believe you testified about Mr. Ovadal, he was seeking clarification from you regarding this ban on his speech, correct?
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Q And he asked you a series of questions about it, is that right?
A Um-hum.

Q Is that yes?
A Yes.
Q And you did not indicate any time that he could be on that overpass, isn't that right?
A That is correct.
Q Or any other overpass in the City of Madison where he could speak. Is that correct?
A That's correct. I was dealing with this one specific incident and I did not provide him with specific times on other overpasses.
Q Sure. You told Mr. Ovadal that the venue overpass is not suitable for demonstration, isn't that right?
A Yes, I did.
Q And you viewed the restriction as being, your words was venue-based, is that right?
A I -- I did use the word venue-based.
Q Now you would permit him to walk on the bridge as any citizen but he couldn't carry a sign, is that right?
A It's a pedestrian overpass. Again, the totality of the banners, the signs, the waving, that's what created the term we're now using, spectacle, or thing that diverted people. But as –

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Q I'm not using spectacle.
A Okay. Well, I am. But it was -- all of that combined created the reason that I made the decision to have them --
Q Sure. So I guess --
A -- leave the bridge.
Q I'm sorry. Are you finished?
A I am.
Q I guess what I'm trying to clarify here, you were not banning his presence. He could go on the bridge but he could not go up there with the sign, is that right?

MS. ROTTIER: Object as an incomplete hypothetical.

THE COURT: Sustained.

MR. KELLUM: It's not a hypothetical, Your Honor. I'm asking him a question whether --

THE COURT: I heard what you answered and you heard my ruling.

MR. KELLUM: Okay, I'm sorry. I didn't --

THE COURT: Form of question.

MR. KELLUM: Okay. Thank you, Your Honor.

THE COURT: Sustained.

MR. KELLUM: Thank you, Your Honor.

BY MR. KELLUM:

Q Did you ban Mr. Ovadal's presence?

MS. ROTTIER: Objection; cumulative.

THE COURT: Overruled.

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BY MR. KELLUM:

Q You can answer the question.

A Did I ban his presence.

Q Yes.

A I ended the demonstration --

Q Could you just answer -- I'm sorry.

A -- that was occurring.

Q I move to strike that as nonresponsive. Could you just answer the question? Did you ban his presence?

MS. ROTTIER: Object to the form of the question. That evening?

THE COURT: Sustained as to it's vague -- as vague.

BY MR. KELLUM:

Q Did you at that time on September 2, 2003, did you ban Mr. Ovadal's presence on that bridge?

A No, I did not.

Q Now your concern as expressed to Mr. Ovadal was people slamming on brakes because they're upset, is that right?

A Is that what's in the transcript of the conversation?

Q Yeah, the video transcript. Do you recall saying that you're concerned about people slamming on their brakes because they're upset?
A Okay. Again, like Officer Fields said, if it's in the videotape I -- that's what came out of my mouth, so.
Q And that this restriction on signs on overpasses applied in

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the City of Madison, isn't that right? Is that what you said?
A This ban on overpasses in the City of Madison.
Q Yes.
A Yes, and as I answered prior, I felt that Mr. Ovadal was going to leave this particular bridge after we had spent an hour and a half and several resources and go to another bridge in a close proximity. So was I trying to give Mr. Ovadal clear direction, letting him know that at some point someone has to make a decision and the buck stops somewhere? Yes, I believe I did say that.
Q But you didn't say I'm concerned about you going to the next overpass. You said in the City of Madison, isn't that right?
A I believe I said something to the effect of overpasses in the City of Madison and, yes.
Q Now I believe Mr. Ovadal wanted to know if this was the stance of the Madison Police Department, is that right?
A He wanted to know that in addition to other things, yes.
Q And that's when you reiterated there was no lieutenant or captain for him to speak to, that you were making the decision, is that right?
A Yes.
Q Now afterwards you let your captain, who I think was Captain Graber at the time --
A Captain Randy Gaber.

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Q Yeah. -- know about the incident, is that right?

A Yes.
Q And you also conferred with Sergeant Grady, is that correct?
A That is correct.
Q And as you testified on the deposition, you and Sergeant Grady are sergeants in the same district, is that right?
A We were at that time in 2003.
Q Okay, I'm sorry, 2003.
A Yes, we were.
Q And Sergeant Grady informed you that he heard about a situation with Mr. Ovadal using signs on a pedestrian overpass in the Town of Madison, is that right?
A What I -- yes. What I testified in the deposition to is it's during our discussion we had made -- the reference was made to a Town of Madison incident.
Q And Sergeant Grady heard about the Town of Madison's handling and he was inquiring about how you handled Mr. Ovadal's signs, is that right?
A That's correct.
Q Now this conversation, according to what you testified on October 13, it took place after your encounter --
A Um-hum.
Q -- with Mr. Ovadal --
A Yes.

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Q Is that right?
A Yes.
Q And again according to your deposition, it was prior to Sergeant Grady's encounter with Mr. Ovadal on October 11, 2003?
A I did say that at deposition, and again what I indicated to counsel was it's my belief after watching the videotape of Sergeant Grady and Mr. Ovadal's interaction, it's my belief that that testimony was wrong.
Q Okay. So just tell me if I'm mistaken about this, but I

guess based on your own memory and independent knowledge you thought it was between.
A Um-hum.
Q But after reviewing the video you think it could be a mistake?
A Yes.
Q And this conversation was initiated by Sergeant Grady, is that correct?
A Yes.
Q And you informed Sergeant Grady how you handled the situation, is that right?
A Yes.
Q Now I believe you have observed other individuals besides Ovadal carrying signs on pedestrian overpasses in the City of Madison, is that right? A Yes.

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Q And I believe according to your deposition you recall seeing a banner hung over a pedestrian overpass over the Beltline, is that right?
A Yes.
Q And from what you recall, I think you described some of the things and that is a lot of signage dealing with high school tournaments, wrestling or basketball with basically Go Team type signs, is that right?
A Yes.
Q And to your knowledge no one other than Mr. Ovadal has had their signs restricted on pedestrian overpasses, is that correct?
A Yes. That's a correct answer, or correct.
Q That's all right. Thank you, Sergeant Paulson.
A You bet.

REDIRECT EXAMINATION

BY MS. ROTTIER:
Q One quick redirect and then you'll be done.

A Yes.
Q Is it police department protocol before you respond to 911 calls reporting near crashes and slamming on brakes to call up the callers to find out if they're legitimate before you do something?
A No. If, and to -- to just further clarify that. If we were to get a call of a criminal nature and we have one call

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from an anonymous complaint, that's one situation. In this situation or in situations where we have multiple calls reference one particular incident, it would be unreasonable and unrealistic to think that the police or the 911 Center would be able to make those phone calls and inquiries and debrief folks. In fact the 911 Center, once they get a certain number of calls reference one incident, simply take the other calls and don't necessarily debrief people very in-depth. And we of the Madison Police Department do not routinely go back on noncriminal cases and do follow-up with the 911 Center.
Q Did you think it was a reasonable prospect for you to call up the callers before you made a decision on how to deal with the situation that had been reported to you on the Beltline overpass?

MR. KELLUM: Objection; leading.
THE COURT: Sustained.

BY MS. ROTTIER:
Q Would it have made sense to call up the callers before acting?

MR. KELLUM: Objection; leading.
THE COURT: Sustained.
MS. ROTTIER: I have no further questions.
MR. KELLUM: Nothing further, Your Honor.
THE COURT: The witness may be excused.

THE WITNESS: Thank you.

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THE COURT: Defendants' next witness.
MS. ROTTIER: Sergeant Grady, please.

PATRICK GRADY, DEFENDANT, SWORN

DIRECT EXAMINATION

BY MS. ROTTIER:
Q Could you give us your name, please?
A Patrick Joseph Grady.
Q In which city and state do you live?
A I live in Madison, Wisconsin.
Q How are you employed?
A I work for the Madison Police Department.
Q What's your rank or title?
A I'm a sergeant of police.
Q And how long have you been a sergeant?
A I've been a sergeant for 22 years.
Q And how long have you been employed in total in policing for the department in Madison?
A Twenty-five.
Q Which district do you currently work out of?
A I work out of the central district.
Q Was that these same district back in October of 2003?
A No, I worked out of the south district at that time.
Q Were you on duty for the police department on Saturday morning, October 11, 2003?
A Yes, I was.

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Q What district that day?
A That was the south district.
Q During the course of your work that day did you have occasion to come in contact with an individual named Ralph Ovadal?

A Yes, I did.
Q Would you describe for the Court the circumstances that led up to your encounter with Mr. Ovadal?
A I was on routine patrol on the Beltline eastbound approaching Park Street intersection and I noted traffic slowing down considerably. I would say probably a 15 to 20 mile an hour drop in what the people would ordinarily do. And it looked to me to be a hazardous situation. It's a three-lane highway. It's a game day. We have a lot of different people coming into town. It's also, there's an on ramp just before that or just -- yeah, just before the overpass and people -- it looked to me to be a very hazardous situation.
Q How would you describe the extent of traffic as you were traveling eastbound on the Beltline that morning?
A I would say it would be moderate.
Q What was the first thing out of the ordinary that you noticed in traffic?
A I noticed signs on -- and people up on the pedestrian overpass.
Q When you talked about a slowdown in your earlier answer,

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how significant a slowdown in traffic were you observing?
A I'd say 15 to 20 miles an hour. That's what I had to slow down.
Q Prior to the slowdown was Beltline traffic going at highway speed?
A Yes, it was, or -- or higher.
Q Did you look around in an attempt to determine what was causing the slowdown in traffic?
A Yes, I did.
Q What did you see?
A I saw the individuals and the signs on the top of the overpass and it appeared to me that they were the cause of the slowdown, and I pulled over to the right side of the road on the shoulder area and attempted to -- got out of my car

and attempted to contact the individuals on the overpass.
Q How far in front of you or how far away from you were the protestors and the signs when you first noticed their presence there?
A Oh, I would say -- oh, boy. Probably a quarter mile.
Q Was the wording on the signs visible at the time you first had --
A No.
Q -- some vision of this?
A No.
Q Did you consider the slowdown in traffic that you were

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observing around you to be hazardous?
A Yes, I did.
Q Why?
A Because a 15 to 20 mile an hour drop on a heavily traveled highway at that location with the on ramp I thought was a very hazardous situation. It just -- it would surprise people. People are looking up at the overpass rather than paying attention to the people in front of them or to the side of them. Plus, they have traffic coming on the Beltline from the on ramp from Park Street inbound.
Q Was the protest activity as you observed it creating a distraction to drivers?
A Yes, it was.
Q Did you consider, Sergeant Grady, just driving by and not stopping to deal with the situation?
A No, I did not.
Q What did you decide to do?
A I decided to stop and ask them to leave the crossway. I told them that -- the overpass. I told -- I tried to get their attention but, you know, there's semis going by and there's six lanes of traffic plus on ramps and off ramps, and I don't -- I couldn't hear them and they couldn't hear me I don't think.
Q Did you ultimately park your car in a position where

you were able to go and speak with the leader of the protest group?

A Yes, I got back into my car and I drove to Rimrock Road

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which is about a quarter mile from the main overpass. Went on Rimrock Road over to Rusk Road and up where I could park and, and come and see the people in the -- on the overpass.

Q How long a conversation did you have with Mr. Ovadal?

A I would say probably 10 to 15 minutes.

Q And what do you recall that you told him about the situation?

A I told him -- well, I first introduced myself and then I told him that I felt that what he was doing was creating a hazardous situation for drivers on the Beltline, both east and westbound, and that he would have to leave.

Q What is the situation with respect to whether that overpass that's near the Park Street exit by Nedrebo's, whether that's Town of Madison jurisdiction or City of Madison jurisdiction?

A Several months prior to that it was Town of Madison but there's a agreement between the Town of Madison, the City of Madison, the City of Fitchburg relating to annexation of the Town of Madison. It's a phased-in annexation and that was one of the -- one of the new annexations for the City.

Q So whose jurisdiction was that overpass?

A It was the City of Madison.

Q When you spoke to Mr. Ovadal that Saturday morning did he tell you that he had had a previous encounter with a tall, big guy who was a sergeant on the second shift?

A Yes, he did.

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Q And when he described him as a tall, big guy on the second shift did you know who he was probably --

A I --
Q -- referring to?
A Yes, I did. Sergeant Paulson.
Q And what would be Sergeant Paulson?
A Yes.
Q Okay. Had you known about any encounter between Mr. Ovadal and Sergeant Paulson before your own discussion with Mr. Ovadal?
A No.
Q What was your reason, Sergeant Paulson [sic], for telling Mr. Ovadal and his group that they should move the protest elsewhere?
A It was a traffic hazard. I believed his demonstration was causing people to slow down and I think that conduct created a disturbance, created the situation where it was a hazardous situation for drivers both east and westbound on the Beltline, and that's the only reason why I contacted him.
Q Now let's talk about that. Did you see any drivers gesticulating that they were angry with the message or giving them the finger or doing anything to express displeasure with the message?
A No, I did not.
Q What you saw was the slowdown in traffic from people

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looking at the display?
A Yes.
Q Had you known of any Town of Madison involvement with Mr. Ovadal on overpasses before you had this encounter?
A No, I did not.
Q Where did you learn about that?
A Afterwards. They can copy our radio. We can't copy theirs. They evidently heard that I was there and they heard who I was dealing with and they told me.
Q Okay. Did you tell Mr. Ovadal that he and his

colleagues might be cited for disorderly conduct if they refused to move the demonstration elsewhere?

A Yes, I did.

Q During your conversation, the short conversation you had with Mr. Ovadal that morning, did you suggest he contact your captain to arrange a better location for him to have a protest or engage in expressive activities?

A Yes, I did. We try to encourage groups that are going to demonstrate in the Madison area to contact our dispatch center or our officer in charge and so we can coordinate what they do and where they go. And, you know, if they need some additional police protection, we can arrange that for them.

Q At the time of your interaction with Mr. Ovadal that morning were you aware of any written City policy on how to deal with expressive activities on the Beltline overpasses?

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A No.

Q Why didn't you just drive by, Sergeant Grady?

A Because my job is to deal with situations which I view a threat to safety for drivers and for people in the City of Madison. I mean, that's my job to deal with that and that's why I stopped.

Q You have the authority to deal with a specific incident that's occurring basically on your beat, right?

A That's affirmative.

Q In -- That's affirmative?

A Yes.

Q In addressing that situation were you attempting to set policy for the whole city?

A No, I was not.

Q One hypothetical question for you, Sergeant Grady. If you're on the same Beltline highway that same morning and you see no traffic problem created by the demonstration, what would you have done?

A Drive by.

Q Why the difference in response?
A The safety hazard. That was the whole reason why I stopped. The message had nothing to do with me stopping. I didn't see anybody gesturing. I didn't see anybody -- I didn't receive any calls from dispatch that people were upset with it. That wasn't the issue at all. In fact, I really didn't see the

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signs really well until I got up on the bridge and then I, then I saw what it was about.

MS. ROTTIER: That's all I have. Thank you.
THE COURT: Cross-examination.
MR. KELLUM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KELLUM:
Q Hello, Sergeant Grady.
A Could I have some water?
Q Certainly.

THE COURT: It's probably dry right now.
THE WITNESS: Oh, you got to put this?
THE COURT: Theory as why I'm kind of a camel. Don't ever use it.
THE WITNESS: Thank you.
THE COURT: It's bad for you. Rust your pipes. All right.

BY MR. KELLUM:
Q Sergeant Grady, on October 11, 2003 you were a dayshift sergeant in the same district as Sergeant Paulson, is that correct?
A Yes, I was.
Q And this October 11, that was a Saturday morning, is that right?
A Yes, sir.

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Q It was about 8:30 a.m., is that right?
A Yes. Yes, sir.
Q And that's when you noticed a demonstration on the pedestrian overpass?
A Right. Yes, sir.
Q Now signs were visible from the highway, correct?
A Yeah. Once you go up closer to them, yes, sir.
Q And Ovadal and others were holding signs condemning homosexuality, is that right?
A Yes, sir.
Q Now you approach Mr. Ovadal and you tell him either he can stop holding the sign or he would face arrest, is that right?
A Basically, yes, sir.
Q Now there were no reported near crashes --
A No, sir.
Q Is that right?
A No, sir.
Q And I believe during your exchange with Mr. Ovadal you were videotaped, is that right?
A Yes, I believe I was.
Q And Mr. Ovadal advised you that the Town of Madison had previously dealt with the situation and decided to allow his demonstration on that overpass, is that right?
A Yes, sir.
Q Okay. But it really didn't matter to you how the Town of

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Madison had handled the situation, is that correct?
A No, sir, it didn't.
Q Now I believe you testified about cars slowing down. Is that right?
A Yes, sir.
Q And if you did not see cars slowing down then you'd have no basis for disorderly conduct, is that correct?
A I believe if there wasn't a safety hazard there I

wouldn't have stopped.
Q So the answer is yes?
A Yes.
Q And I believe in your description of slowing down, that was a 15 mile per hour difference, is that right?
A Fifteen or 20, yes, sir.
Q So you're talking about like 60 to 55 to 45, 40, is that right?
A Yes, sir.
Q Now, of course you did not talk to anybody who had slowed down, is that right?
A No, I did not.
Q So sitting here today you don't know the reasons why they slowed down, is that right?
A Well, I know why I slowed down. Because everybody else was.
Q You slowed down?

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A Because they were -- they were looking at, you know, they were looking at the overpass.
Q I thought you slowed down because cars in front of you were slowing down?
A Well, that's why they slowed down.
Q Did you ask them?
A No, sir.
Q Okay. So, but you knew their attention was drawn to the overpass, is that right?
A Yes, sir.
Q Okay. Now your first mention of slowdown was I guess in your accident report, is that right? I'm sorry, let me -- I'll withdraw that question. Did you ever mention cars slowing down to Mr. Ovadal?
A I said that he was creating a traffic hazard and I, I believe I probably covered that.
Q I'm asking you do you specifically recall saying slowdown?

A Do I specifically recall those words? No.
Q Okay. I believe what you told Mr. Ovadal is the way you looked at it there's cars going 60, 70 miles per hour and they're looking up at you. That's what you told Mr. Ovadal.
A Well, I think I may have said that they were slow-- that it was a significant traffic hazard because they were slowing down. I mean, I had to mention that.
Q Okay.

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A I mean, I couldn't say they were going 60. I mean, I --
Q Well, I think you just -- I'm sorry. You just testified there was a video of your exchange, right?
A Yeah, a video that was really unclear. I mean, I -- I -- when I saw the video I understood probably 20 percent of what was said.
Q Do you recall anywhere in the -- did you view the transcript of the video?
A Yes, I did.
Q Okay. Did you see anywhere in the transcript where it mentions you saying about cars slowing down?
A I -- could I -- do you have a copy I could see?
Q I do. I do. Would you like just to view it?
A If I could, sir.

MR. KELLUM: May I approach?
THE COURT: You may proceed.

(Short pause)

THE WITNESS: I guess you're right.

BY MR. KELLUM:
Q Now if you will, while you still have that, if you'd look on I guess the top of page 1 at line 24.
A Page 1?
Q Yes, page 1, line 24, and then the top of page 2 -- I'm sorry -- yeah, top of page 2 to line 2, that what you tell Mr. Ovadal is I guess my feeling is that you present a traffic

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hazard there. You've got people going 60, 70 miles an hour

down there and they're looking up, up there and seeing you. Is that right?

A Yes.

Q Now your accident report was made I think some six weeks after the incident, is that correct?

A Yes, sir.

Q And so initially you were not planning on making a report about this, is that right?

A No, this was a 10- or 15-minute contact. I didn't --

Q So you --

A I didn't view it as significant.

Q It didn't seem to justify a report, is that right?

A I don't think so, no.

Q Okay. But then you were requested by Lieutenant Wahl --

A I believe that, yes, sir.

Q -- to make a report, is that right?

A Yes, sir.

Q And Lieutenant Wahl was involved because anything routed to the Chief of Police involves Lieutenant Wahl?

A Yes. At that time, yes.

Q And I believe according to that report, Lieutenant Wahl got a copy of your accident report, is that right?

A Yes, he did.

THE COURT: We're going to at this time recess for

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one hour. We will return at 2 p.m. for further testimony in this matter. The witness may be excused subject to recall at 2 p.m.

MR. KELLUM: Thank you, Your Honor.

THE CLERK: All rise.

THE COURT: Before leaving, anything further that either counsel wish to bring to the Court's attention before we return at 2 p.m.?

MS. ROTTIER: No, Your Honor.

MR. KELLUM: No, Your Honor.

THE COURT: All right.

(Recess at 12:59 p.m. until 2:07 p.m.)

(Call to Order of the Court)

THE COURT: All right, you may continue your examination of the witness.

MR. KELLUM: Thank you, Your Honor.

BY MR. KELLUM:

Q Sergeant Grady, we're picking back up where we left before lunch. To your knowledge has anyone other than Mr. Ovadal been forced to leave a pedestrian overpass for carrying a sign or a banner?

A Not that I'm aware of, no.

MR. KELLUM: That's all the questions I have.

MS. ROTTIER: Nothing further, Your Honor.

THE COURT: Have you ever had circumstances of this

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nature confronting you before?

THE WITNESS: No, sir.

THE COURT: Anything further?

MR. KELLUM: Nothing further.

THE COURT: All right, the witness may be excused. Next witness.

MS. ROTTIER: Lieutenant Wahl. Your Honor?

THE COURT: Yes.

MS. ROTTIER: Could I just reflect the fact that Sergeant Paulson's back was spasming so he's no longer in the courtroom because he's trying to get some medical attention.

THE COURT: Yeah, he had me worried for a while. I thought he really did injure himself on that chair. File a Federal Torts Claim Act.

VICTOR WAHL, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

BY MS. ROTTIER:

Q Could you give us your full name, please?

A Victor Wahl.

Q And where do you live, sir?

A In the City of Madison.

Q And how are you employed?

A I'm a lieutenant with the City of Madison Police Department.

Q In the hierarchy at the City of Madison Police Department

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where is lieutenant relative to an officer and a sergeant?

A I'm superior in rank to both police officers and sergeants.

Q How long have you been employed by the Madison Police Department?

A A little bit over 14 years.

Q And back in the fall of 2003 what was your position with the department?

A I was the lieutenant responsible for professional standards in Internal Affairs.

Q What does that mean in general? What would you do in that capacity?

A The primary role of that position is to investigate allegations of misconduct against police officers, whether they be external or internal.

Q As part of your duties in the fall of 2003 had you become familiar with Madison Police Department policies and procedures?

A Yes.

Q Does the Madison Police Department have written policies and procedures?

A Yes, we do.

Q Very briefly, how are those policies created?
A There's an actual policy that outlines the creation of policy. The policy has to be reviewed by several different bodies and then ultimately the Chief of Police has the final

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say over what does and does not become policy.
Q Is the chief the ultimate authority for establishing policy for the department?
A Yes.
Q Is there a distinction in policing for the Madison Police Department between incident authority and policymaking authority?
A Yes.
Q Would you explain that very briefly?
A Well, any rank within the police department has authority to respond to incidents, individual incidents and make decisions within our broader policy parameters, but only the Chief through the policymaking process has the authority to establish policy that apply to all departmental members at all times.
Q I want to ask a few questions now, Lieutenant Wahl, about policies and procedures existing for the department as of the fall of 2003. Was there any specific policy or procedure of the Madison Police Department related to expressive activities on pedestrian overpasses that span the Beltline?
A There was not.
Q And then going forward from the fall of 2003 up to the fall of 2005, was there a departmental policy that expressed -- addressed expressive activities on Beltline overpasses?
A No.

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Q Are you aware of the fact that the Madison Common Council recently passed an ordinance addressing expressive activities on Beltline overpasses?
A Yes, I am.

Q The Court has already been provided with defendants' substitute Exhibit 208. I'd just ask if you could look at that briefly and tell me if that is the ordinance that was passed just a couple weeks ago?
A Yes, it is.
Q The new ordinance, does it ban the display of banners and signs on Beltline overpasses other than state-approved traffic signs?
A It does.
Q So now we've got an ordinance and previously you've told us about departmental policies and procedures. How do those two things dovetail?
A Well, this ordinance will have the effect of policy because officers will be expected to adhere to it once it is effected.
Q How will information about the existence of the new ordinance be disseminated to officers in the field?
A I can't say for certain but typically there'd be a summary that would go out to officers, probably something discussing briefing from supervisors to officers to make sure that they're familiar with the parameters of the ordinance.
Q Lieutenant Wahl, let's go back into the fall of 2003 and

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the time period up to the passage of the ordinance roughly a two-year and a little bit time period. During that timeframe how was a City of Madison police officer expected to deal with a situation where he or she either observed personally or had reported to him or her a significant traffic hazard caused by the spectacle of a demonstration on a Beltline overpass?
A Well, as I said we don't have a specific policy addressing that, but my expectation would be that an officer would evaluate the extent and the degree of the traffic hazard that was being created by the activity and then move forward after that assessment was made.

Q How would the department expect an officer to determine whether a traffic hazard existed and how significant it was?

A There's a number of objective factors that I would say that would go into that determination; the volume of traffic, type of the road, the weather conditions, the speed, whether any accidents had been reported or observed, whether citizen calls had been received describing traffic problems or traffic hazards, lighting conditions. Those types of variables would be part of that determination.

Q Was it ever part of City policy that an officer was entitled to shut down a protest demonstration on a Beltline overpass depending on the content of the message being conveyed?

A No.

Q In other words, Lieutenant Wahl, was there ever a rule that

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would have authorized a Madison police officer to shut down a demonstration whose message the officer disagreed with while allowing a demonstration whose message the officer approved?

A No.

Q Do you recall during your police duties receiving an inquiry from an officer in the field about the existence of a sign posted on an overpass and what the officer should do about it?

A I do.

Q I suspect you can't give me a precise date and time when this happened but can you give me a general timeframe of how long ago it was?

A It was within the last few months.

Q Okay. And why would that inquiry have come to you as opposed to anybody else in the department?

A On that day in question I was filling in for another supervisor as the department's officer in charge, so I was responsible for all patrol operations that day.

Q What advice did you give to the officer about the particular situation?
A I asked if the sign was creating any sort of traffic hazard or safety problems. The officer replied that it was not, and I advised him not to take any action.
Q And why would you give that advice?
A Because there was no reason for us to take any action because the activity or the sign was not creating any traffic

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problems.
Q Lieutenant Wahl, from the fall of 2003 up to the present has the City had an interest in preventing protests on Beltline overpasses if those protests present or create a significant traffic hazard?
A Yes.
Q Why?
A Traffic is actually one of the most pressing issues of the police department as a whole, particularly on the Beltline. We respond to numerous traffic accidents every day across the city and on the Beltline, and protecting the safety of motorists and citizens is of paramount importance to the department.
Q If the City has such a significant or compelling interest the way you've just described it, why would that -- why would it not be the subject of a written official policy before now?
A Police officers by their nature are generalists and officers respond to so many different types of incidents and situations that it's impossible to preemptively address every single possible situation through a written policy, and instead we use our policy manual to paint sort of the broad brushes of what expectations of officers are and that officers have to utilize their discretion within those parameters.
Q Lieutenant Wahl, I think you described the City's policy on traffic safety as, I forget the word, paramount I believe is what you said or compelling, words to that effect. Is there

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something about the nature of the Beltline itself that ratchets

up the level of the City's interest?
A Yes, there is.
Q Explain that, please.
A Well, the two primary factors at play on the Beltline are the volume of traffic, it's one of the most highly trafficked and busy roadways we have in the city, and the speeds on the Beltline. Of course the speed limit is 55 and the pace of traffic is usually moving above that. And those combination, the combination of a high traffic volume and that high speed limit creates a pretty compelling need for us to maintain a safe environment on the Beltline.
Q Is it a feasible alternative for a police officer facing a traffic hazard on the Beltline that appears to relate to a protest on a nearby pedestrian overpass to address the problem by getting down onto the Beltline and directing traffic?
A It is not.
Q Why not?
A I guess the primary reason is that there's no action an officer or officers could take that would minimize or eliminate the traffic safety hazard under those conditions. The very fact of an officer trying to get on the Beltline either on foot or in a car and somehow impact the vehicular traffic would in and of itself create a greater hazard than the underlying issue.
Q So it would make the problem worse rather than better?
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A That's correct.
Q Lieutenant Wahl, were you aware of the police action with respect to Mr. Oyadal when it occurred on September 2, 2003?
A I was not.
Q How about when the incident occurred on October 11, 2003?
A I was not.
Q How did you first become aware of the incidents?
A The Chief received a letter in the mail that came to my attention because of my position.

Q And I'm going to show you a copy of that letter which I believe is Plaintiff's Exhibit 6. Can you identify the letter that I've handed you dated October 31, 2003 as the letter you're referencing?

A Yes, this is it.

Q Have you seen that letter before? Have you reviewed it more recently so you know what's in it?

A Yes.

Q Okay. Is there anywhere in that letter where counsel for Mr. Ovadal is requesting clarification of a City policy?

A No.

Q If you look at the -- near the, near to the end of the letter, does it appear Mr. Ovadal is threatening a lawsuit unless the City agrees to certain settlement terms?

A It does.

Q After you became aware of Mr. Ovadal's threat to sue the

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City, did you ask Sergeant Grady to prepare a report of his encounter with Mr. Ovadal in October?

A I did.

Q Why did you do that?

A Because of the threat or potential of a lawsuit that was put forth through this letter I just felt it was important for Sergeant Grady to memorialize and document his actions on that day.

Q Did you in asking Sergeant Grady to prepare a report ask him in any way, suggest in any way that he create a report that was anything other than his complete and truthful memory of the incident?

A No.

Q Lieutenant Wahl, have you recently become aware that on election day of 2004 there were some individuals with Kerry-Edwards political signs displaying them on the sidewalk of the bridge that carries vehicular and pedestrian traffic across the Beltline at Fish Hatchery?

A Yes.
Q Have you reviewed the tape that the plaintiff recently provided about that?
A I have.
Q And did it appear from the video that there were Kerry-Edward campaign signs placed so as to be visible to traffic proceeding on the Beltline and vehicular traffic on the Fish

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Hatchery bridge?
A Yes, it did.
Q If you had been contacted for advice about how to deal with the situation presented by the election day signs on the Fish Hatchery bridge, how would you have responded, Lieutenant Wahl?
A I would have determined through the officers present whether the activity that was going on was impacting traffic safety and creating a traffic safety hazard.
Q Okay. And if it was, then what?
A If it was, then I would advise the officers to speak with the people engaging in that behavior and seek voluntary compliance, see if there was a way we could accommodate them so they could still display their signs in a way that would not affect traffic safety on the Beltline or on Fish Hatchery Road.
Q And if it was not impacting traffic safety or the police officer that reviewed the scene determined that there was not a significant problem created, then what?
A Then I would tell them not to take any action.
Q When you reviewed the video that Mr. Foht shot of events on election day 2004 at the Fish Hatchery bridge did you see any police vehicles that were being photographed as being in that area?
A Yes.
Q Were those vehicles City of Madison police vehicles?
A They were not.

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Q What municipality do they belong to?
A They appeared to be City of Fitchburg police vehicles.
Q And in terms of the activity of the individuals at the Fish Hatchery bridge that were in the video that day, from your review of the video where did it -- where did it look to you that the activity of the Kerry supporters was primarily directed?
A As near as I could tell from the video, the primary focus was on the Fish Hatchery Road traffic.
Q And why do you say that?
A That's where the sign holders, the people were focusing their attention. That's where they were walking. The sidewalk was directly adjacent to the roadway and it appeared that their attention was focused on those vehicles.
Q Do you recall them having megaphones?
A Yes.
Q And directed towards where?
A Towards the roadway on Fish Hatchery Road.

MS. ROTTIER: That's all I have. Thank you.
MR. KELLUM: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. KELLUM:
Q Hello, Lieutenant Wahl.
A Hi.
Q We've met before, correct?

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A Yes.
Q I believe I took your deposition on October 13, 2005, is that right?
A That's correct.
Q And at that time you were testifying on behalf of the City of Madison, is that correct?
A That's correct.
Q Now the pedestrian overpasses in the City of Madison come under the jurisdiction of the Madison Police Department,

is that right?
A Yes.
Q And you're testifying that police officers being generalists, I believe was the term you used, that they could address situations involving expressive activity on pedestrian overpasses if it seemed to create a safety hazard, is that right?
A That they could address it?
Q Yeah, they could address it or they would approach a situation if it was creating a safety hazard, is that correct?
A Yes.
Q Now it's true, isn't it, that there's no protocol, there's no guidelines, there's no standards that are supplied to these individual officers for determining how to handle those situations, is that right?
A There's not a specific policy addressing that specific fact

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situation that you're describing. That's correct.
Q And I believe what your testimony was is that it's up to the individual discretion of the police officer, is that correct?
A It's up to their discretion within the wider parameters created by our policy and by our training.
Q Now in that regard there's no guidelines or factors that are supplied to officers for determining what exactly constitutes a safety hazard, is that right?
A We do not have a specific document, policy that articulates specific factors to be considered, no.
Q And so then it would be up to the individual police officer to determine whether or not this is truly a safety hazard, is that right?
A Again as I mentioned within the broader policy and training parameters, yes.
Q And I think we talked about this on the deposition, and because of this two police officers can view the same situation where one could view it as being a safety hazard

and another can view it as not being a safety hazard, isn't that correct?

A I would say that's true in many aspects of policing and in the situation you're describing, yes.

Q Lieutenant Wahl, do you recall signing an affidavit in this case at some point?

A I do.

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Q And making reference to an accident that occurred on that same day. Do you recall that?

A Yes.

Q Now there is no evidence that this accident has any relationship to Mr. Ovadal's expressive activity, isn't that correct?

A I don't know that I would characterize it as being no evidence.

Q Okay.

A I would say that I can't tell you with an absolute certainty that it was caused by it, but I would not agree with that characterization that there's no evidence.

Q Well, sure. Let's take a look at it.

MR. KELLUM: Your Honor, may I approach?

THE COURT: Yes.

BY MR. KELLUM:

Q Lieutenant Wahl, can you take a look at that and tell me what is that document?

THE COURT: Is that Exhibit 1?

MR. KELLUM: I'm sorry. It is, if I could find my list of exhibits, I believe --

THE COURT: Well, it's Plaintiff's Exhibit 1 if it's the Wisconsin motor vehicle accident report.

MS. ROTTIER: I have it as No. 3.

THE COURT: All right.

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MR. KELLUM: Yeah, I think it's Exhibit 3.

THE COURT: Maybe it's 3.

MR. KELLUM: Well, it's Exhibit 3.
THE COURT: All right.
BY MR. KELLUM:
Q Now on the accident report that reflects an investigation by the officers on the scene, is that right?
A Correct.
Q Okay. And there's a narrative in there, is there not, that describes what happened, is that right?
A There is.
Q Okay. And in that narrative in that accident report there is absolutely no mention of Mr. Ovadal's activity, isn't that right?
A In this narrative in this accident report?
Q Yes.
A That's correct.
Q Okay. And also I think there's something that the officer, the investigating officer would fill out regarding factors relating to the accident, isn't that right, where the driver factors and highway factors, is that correct?
A That is correct, yes.
Q And I believe under driver factors it talks about vehicle number 1, the driver driving too fast. Is that correct?
A That -- the speed too fast for condition is checked for

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unit number 1, yes.
Q And then there's also highway factors which has underneath that visibly obscured. So then if there was some visible impairment as far as a highway factor, that would be checked off, is that correct?
A Yes. I think typically what that category is used for is weather conditions; fog, rain, snow, that sort of thing.
Q But what it says is visibly obscured, is that correct?
A Visibility.
Q Yeah, visibility obscured.
A Yes.
Q And that's not checked, is that correct?

A That's correct. It is not checked.
Q And then also I guess there's other which could include things such as a distracting protest, is that right?
A Yes.
Q And that's not checked, is it?
A No, it is not.
Q You mentioned a new ordinance, Lieutenant Wahl, that you've become aware of, is that correct?
A Yes.
Q Now were you aware, Lieutenant Wahl, that that ordinance does not become effective until it's published?
A Yes.
Q To your knowledge has that ordinance been published?

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A Not to my knowledge, no.

MR. KELLUM: Thank you. That's all the questions I have.

MS. ROTTIER: Nothing further.

THE COURT: The witness may be excused.

MS. ROTTIER: I have no further witnesses, Your Honor. I rest.

THE COURT: Rebuttal?

MR. KELLUM: Nothing further, Your Honor.

THE COURT: All right, the Court will recess for approximately 45 minutes returning at 3:15. I'll hear your closing argument and will at that time announce the decision, Court's proposed findings of fact prepared as my findings of fact, conclusions of law and I'll, after hearing your argument will enter the judgment in this matter. We'll then stand in recess until 3:15.

(Recess at 2:31 p.m. until 3:23 p.m.)

(Call to Order of the Court)

THE COURT: At this time then we'll hear the closing argument of counsel. Mr. Kellum, do you wish to be heard?

MR. KELLUM: Yes, Your Honor. Your Honor, as this Court noted in its order of November 22nd, 2005, that due to the remand from the Seventh Circuit Court of Appeals there are really only two issues. One is, is it content-based and the other is, is it narrowly tailored. And I believe what the

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evidence has set forth today in a really clear fashion is that the ban is content-based and it is not narrowly tailored to the legitimate interest that the City of Madison has in promoting safety on its highways.

As far as the content-based issue, I believe what the Court has heard and what the factfinder, that being the Court, has heard is that the ban is inextricably tied to the message, and this is to be distinguished from whether or not the police officers have any personal disdain or that they tried to target the message themselves. I don't believe there's any evidence of that and that hasn't been a claim brought forth by Mr. Ovadal. Of course what's cogent here is that the ban is premised on the drivers' reactions.

The case law is rather clear. It was cited by the Seventh Circuit in this case of Ovadal and just following U.S. Supreme Court, most notably Forsyth v. Nationalist Movement, a 1990 decision, that listeners' reaction to speech is content-based. And as this Court observed in ruling on the previous rounds of summary judgment motions that the restriction here is necessarily linked to the message in a sense that there's some complaints about the message but even to the extent they're complaints about safety is because of what the message was creating, in a sense that you had people reacting and reacting in a hazardous and a careless manner, as Officer Fields would say, due to what Officer Fields referred as outrage to the

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signs. And so the evidence is really replete that it is because the drivers' reactions to these signs that has caused the

problem, and this is to be distinguished from any other sign that's been exhibited.

I have no reason to discount what the officers have said that, Well, if the Green Bay Packers or if a high school team saying Go Team, if that sign created safety problems they would react to it. I don't discount that at all, but of course that turns on the message. There's nothing, even with the Packers' less than sterling season, there's nothing controversial about saying Go Packers. There is something controversial to be said about Homosexuality Is A Sin, and therefore that's what it turns on.

And if you remember District Attorney Schwaemle's discussion about this when she was advising Sergeant Paulson on how to deal with this situation, she was very clear that really it didn't -- it really didn't matter what it turned on. If the protest was causing a safety hazard, then the safety hazard is elevated and you do something about the protest. So then it didn't matter if people were looking up to try to read the signs or if they were reacting because they were offended by the signs. It simply didn't matter in the analysis, and so therefore there was absolutely no inquiry. Although for the evidence that we have, even though not a single driver has been interviewed except, except for the –

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THE COURT: Don Johnson.

MR. KELLUM: The gentleman, Don Johnson, who did not mention any problem looking up at the signs. His problem was created by others. So we don't know as to why people were dynamiting their brakes, although I think certainly the most logical deduction is is because they didn't appreciate what was being said. Certainly there was no reports of that as far as people dynamiting on their brakes when they saw Kerry-Edwards signs or they saw the antiwar protesting signs.

Dynamiting on brakes indicates sort of a jerk reaction to the message itself, and of course that's only entrenched

and confirmed by the repeated testimony of the officers setting forth, well, it was because the people were disgruntled, it was because they were upset, it was because of outrage due to the signs. And that's even set forth in their own answer that deals with the display of the message. And I would suggest it's somewhat disingenuous to suggest it would be anything other than the message itself, and I believe that's what shows it's content-based, Your Honor.

From there, as this Court noted in its previous order, then if it's content-based it turns into a narrowly tailoring inquiry. Then if it's content-based it has to be shown as necessary or compelling state interest, and I don't know if there's any evidence of that here. But really specifically targeting what the appellate court has remanded and that is, is

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it narrowly drawn. And with it being a complete total ban it is hard to conceive how it could be considered narrowly drawn.

There's a lot of discussion about this particular overpass on September 2nd being a dangerous overpass. Yet it's important to note that the prescription wasn't, well, you can go on other overpasses but not this overpass because it's dangerous. We've got this off ramp, we've got this hidden exit that's difficult for people to see. So therefore you can do it on other overpasses but you can't do it here. But no, it's a complete total ban on all overpasses.

They could have said, because there's a lot of testimony concerning the dangers associated with rush hour, they could have said, Listen, between 4:00 and 6:00 on weekdays we're not going to permit that. All other times you can come up with the signs but it's just simply too dangerous from the City's perspective for you to be out there with signs between 4:00 to 6:00 during weekdays. They didn't do that. They could have even had just one during the week. They say, Well, during the week we're not going to allow it, but

weekends with lighter traffic that would be fine.

And so there was absolutely no attempt to narrowly tailor it to the concern. There's no attempt to try to narrowly draw it to the concern. It was just -- it's just an utter, complete ban on Ovadal because they determined in advance that his -- and this is regardless whether he has a huge yellow banner or a

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sign -- but his message at all times will create a safety hazard. A determination in advance that's consistent with this ban. And so, Your Honor, I would submit then with that being the record that it is content-based, that it is not narrowly tailored, and the result this ban imposed on Ovadal is unconstitutional. And for that reason I think injunctive relief is appropriate.

Also monetary damages. Now that would be nominal damages for the violation of constitutional right and also to the extent the Court would find damages associated with the fact that he couldn't fulfill his ministry, he couldn't communicate his message. His abstract is hard to calculate but certainly there is -- he testified to that and certainly there's something that could be assigned to that.

And then also declaratory relief in that he has constitutional rights violated. We believe those damages would be in order here. And that's all I have, Your Honor.

THE COURT: Response.

MS. ROTTIER: Your Honor, when the Seventh Circuit remanded this case for further proceedings it said that the key question is whether the City's rule that no protest may take place on overpasses when those protests cause a traffic hazard is capable of content-neutral application, or whether the City, alternatively, has imposed a content-based and impermissible no-Ovadal-on-overpasses rule. Both sides recognize that is the

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key questions but I can see that there's a huge divergence in

opinion between the two sides and how that question should be answered and what the evidence tells us about how to answer that question. And I think, Your Honor, that there are six points quickly that I want to make that establish in my mind quite clearly from the evidence that we do not have a content-based rule or regulation in this case.

The first comes from Mr. Ovadal's own experience. No interference by the City of Madison in six instances where, according to Mr. Ovadal, he demonstrated with others on a Beltline overpass engaging in expressive activity and having no impact on traffic safety. So clearly, there's no no-Ovadal-on-overpasses rule that was in place in the City of Madison.

Second, on September 2nd, 2003 the police had both firsthand knowledge through the personal involvement of Officer Fields and numerous reports to confirm a serious traffic hazard caused by the demonstration. We had Mr. Johnson testify about his own knowledge of it. And the police simply have to have the freedom to react to serious problems on a difficult roadway like the Beltline when there are serious traffic problems evident.

Officer Fields didn't slow down and abruptly -- excuse me -- didn't slow down abruptly and at one point even come to a complete stop because of agreement or disagreement with a message. He had to do so because the spectacle of the protest

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had caused some people to gawk at, to look at, to stop to see this spectacle created with the big banners and signs, and some people did look at that and the result of that is that the people behind them had to stop in order to avoid rear-end collisions.

When the police get 12 or more complaints of people who have been in rear-end collision -- who have been in danger of rear-end collisions or have had to put on their brakes abruptly, it certainly behooves the Madison Police

Department to have the ability to respond to that with a narrowly tailored approach. There was no Madison police officer who acted to halt the protest as a pretext for stopping unpopular but protected speech. In fact the officers, as the testimony has shown, suggested alternative avenues for the protest or alternative means to facilitate the protest.

Second point I would make is that how we show there's a content-neutral application is that the counter-protestors on September 2, 2003 were also asked to depart. The police officers on the scene did not play favorites between one side or another depending on the message being conveyed.

The third point I'd make is that on October 11, 2003, the incident with Sergeant Grady, there's absolutely no suggestion that there was anyone reacting badly to the message other than reacting to the spectacle by doing what I call the startle factor or the curiosity factor or the gawk factor, which is to

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slow down abruptly to see, hey, what's going on up there. Hey, I haven't seen anything like that before. And in those seconds of doing that, taking one's attention away from driving on the Beltline with results for the drivers who are traveling behind. Here we had Sergeant Grady not listening to an anonymous report but knowing what was happening based on his own personal experience in being part of the traffic slowdown that resulted from this demonstration.

The next point I'd make is we move to November 8, 2003. This is after all of these events, after plaintiff complains that there's some sort of an impermissible, unconstitutional City policy to prevent his message on Beltline overpasses. And we have an instance where the plaintiff again is engaged in expressive activities on Beltline overpasses and Madison police officers respond and the complaints in that instance were specific according to the police officer on the scene based on the content of the

message. And the response of the officer was that if there was not a traffic hazard but instead there were only people who were annoyed by the message, that was not a basis for the City response and there was no City response to shut down that demonstration and it continued unabated and Mr. Ovadal was able to engage in expressive activities. So clearly, it cannot be found that there exists in the City of Madison a no-Ovadal-on-overpasses rule. The facts just simply do not permit that conclusion.

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In one of the cases that has been cited in the many, many briefs that have been written in this case, it says that government regulation of expressive conduct is content-neutral so long as it is justified without reference to the content of the regulated speech. And under that definition, that comes from Ward v. Rock Against Racism, a 1989 U.S. Supreme Court case, by that definition there was nothing that was message-based or that was not content-neutral in the regulation of Mr. Ovadal's speech on the two occasions when Madison police officers observed and experienced significant traffic hazards developing on the Beltline as a result of his expressive activity.

I would mention, too, that there have been -- there has been a little evidence of other signs and banners on the Beltline but there has been no evidence that those signs and banners had a significant impact on traffic safety and no evidence that those signs or banners created the same sort of spectacle or curiosity factor or gawk factor as the two 16-foot long big yellow banners would have done held by a large group of individuals.

There was one incidence on September 3 of 2005 where a sign was held by a sole individual on the Beltline and some pictures were submitted to the Court. The pictures don't even really show what the sign says and there's no indication whatsoever, there's no proof whatsoever of any traffic hazard

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that was created as a result.

And when Lieutenant Wahl was testifying I asked him, How would you advise an officer to deal with a situation where there's a banner or a sign, and his answer was, Well, you check to find out if there's a traffic hazard. You investigate further. If there's no traffic hazard, no problem. If there is a traffic hazard, you investigate further to determine the significance of it and then act in the interests of public safety if you need to. I don't know how much more narrowly tailored a policy could be than to advance the compelling interests of the City in safeguarding traffic on the Beltline and tailoring the restriction only when there is an impact on traffic that is observable and that is significant.

The other requirements for a constitutional time, place and manner restriction are easily met. It's narrowly tailored to serve a significant governmental interest and it leaves open ample alternative means of communication all over the city, avenues that Mr. Ovadal has admittedly already availed himself of.

If the Court believes that content neutrality is still an open question because some one, two, three, a handful, however many of the Beltline motorists who observed the protest on September 2, 2003 may have reacted in opposition to the message in a way that affected driving and therefore contributed to the traffic hazard, all I can say is it is impossible for the City,

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it is impossible for me to disprove what may have been in the minds of people who were on the Beltline traveling two years and three months ago. And if that is the standard that I somehow or the City somehow has to prove, it is an impossible one. We can't control thought processes. We can control the fact that our officers responded only to a situation of real danger that they experienced and observed

themselves and was based on reports of problems created by the spectacle of the demonstration.

If the City's prohibition on that particular day and that day only was based even a little bit on drivers' reaction and if as a result the Court thinks that the prohibition can't be said to be completely content-neutral because of case law on that point, then even if the Court reaches that conclusion it doesn't result in a finding of unconstitutional conduct because you go to the next step and you ask whether or not the State has proved that its regulation -- the State -- in this case the City, has proved that its regulation is necessary to serve a compelling State interest or a City interest and the regulation is narrowly drawn to achieve that end.

I think we have proved it. With some trepidation knowing this Court's dislike of cumulative testimony, I solicited from many witnesses the fact that the City has a compelling, a paramount, as many adjectives as I could think of, interest in maintaining safety on the Beltline highway. It's the nature of

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this one and only major expressway around the City of Madison, the volume of traffic, the speed of the traffic, the danger of the traffic, the number of accidents that occur there, the severity of the accidents that occur there, there just simply can't be any doubt that the City has a compelling interest in safeguarding safety in that -- safeguarding traffic in that place and at that time.

And is the regulation narrowly drawn to achieve that end? Yes, it is. In fact, it's interesting. The Seventh Circuit in its decision essentially recommended that the City adopt a policy banning all signs and banners on the Beltline. That would be okay because it would be content-neutral. So there you would have a content-neutral ban which would bar a whole lot more speech than the City's approach of prohibiting a protest only when it had an observable and significant impact on traffic safety. That's an anomalous and

truly unwarranted result if a constitutional policy bans more speech and somehow an effort to allow more speech is found wanting.

If the Court finds that there was any element of motorists' reaction to message in the City's determination of the existence of a traffic hazard on September 2, 2003, then the Court should find that the policy the City implemented was necessary to serve a compelling State interest and was narrowly drawn to achieve that result.

There are a couple of other issues I want to mention just

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very briefly. The plaintiff's burden is, always has been and wasn't changed by the Seventh Circuit's decision and that burden is under Ienco to establish the three prongs that are necessary. One prong is that they have to establish the existence of an express municipal policy, widespread custom, or deliberate act of a decisionmaker with final policymaking authority for the City. And I humbly suggest, knowing that the Court is bound by the Seventh Circuit decision and I am bound by the Seventh Circuit's decision, that the facts scream out that there was no established policy on September 2, 2003.

If there had been an established policy there would not have been the need to call the District Attorney and get some input on what the officers should do. There wouldn't have been the back and forth about, well, First Amendment, public safety, how should we handle this? Yes, they can stay. No, they must go. And then trying to weigh all of these factors into making a determination of what was the best thing to do. If there's anything that suggests, that screams that there was no established policy it is the actual facts of that day.

Finally, if the Court somehow concludes there was some constitutional violation, these officers, these officers are entitled to qualified immunity. Qualified immunity we're

told is available to everyone in a capacity like theirs who is not plainly incompetent and it is insulting to suggest that these officers who were trying to do nothing more than safeguard

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traffic safety on the Beltline could be accused of acting in a way that's plainly incompetent.

Finally, one other thing and that is on the plaintiff's request for injunctive relief. We offered the ordinance into evidence today and we did that so that everyone understood and is on the same page on what is going on here. In following the recommendation basically of the Seventh Circuit and adopting this ordinance, the City was simply trying to do what the Seventh Circuit suggested and to avoid litigation of this kind in the future. The existence of this policy means that the City will have spoken to ban signs and banners on Beltline overpasses other than state-approved traffic signs and no injunctive release from this Court should be allowed to interfere with that legislative and policymaking process. Thank you.

THE COURT: Response.

MR. KELLUM: Nothing further, Your Honor.

THE COURT: The Court has previously announced its findings of fact, both those which have been found in the joint final pretrial report as well as those announced to you from the bench this morning. There are additional findings. Some of them are cumulative.

On September 2, 2003 the plaintiff's display of a large banner and sign created a traffic hazard. Traffic was slowed down at rush hour. Officer Fields was in the traffic slowdown

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as was a witness who was employed by the Sheriff's Department of another county. Fields tried to determine what was causing the slowdown and his testimony determines it was the spectacle caused by plaintiff's signs

and banners.

I think the Court has to be clear in matters of this nature so that its remarks are not misunderstood at the appellate level. It would appear at page 9 -- well, it's not nine. I've still got the -- I hang on to the slip opinions of those that I don't do well in.

In addition, Sergeant Paulson told Ovadal that the police had received reports from drivers who were angered by the signs and the officers were concerned that the drivers would slam on their brakes because they're upset. The Court notes that paragraph and that did indeed occur, but there was no information provided to anyone that it was the message with which the people were outraged. There is nothing whatsoever except the creativity of the plaintiff which suggests that it is the message, and then on cross-examination realized he had overstepped his bounds by signing the affidavit which made mention of that.

There is an assumption on the part of the plaintiff that it's the message, but there is no evidence to suggest that it is the message, none whatsoever, except I guess two counter-protestors in the heat of battle walked up to the top of the mountain and said we've got a message too. Well, if that's

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what you call the persons who have -- opposing the message by believing there's a message, the Court has difficulty in believing that even the plaintiff would believe that that suggests the message which we should be addressing here.

There were a lot of drivers who were angry about the traffic jam which was caused by the activity on the overpass. There is no evidence that the drivers were angry at the plaintiff's message. Don't know how many times that has to be said, but that does seem to be the principal concern of the Court of Appeals.

Don't understand completely the argument of the plaintiff except that they're saying, well, the message is a part of the activity and the fact is the activity is being

conducted because the plaintiff wants to distribute his message, and accordingly you can't consider one without the other. Well, you can certainly understand that if that's the case we wouldn't be here because nothing would be able to be tailored to meet the concerns which have been brought to our attention.

The mere fact that the plaintiffs were engaged in a spectacle, in an event, in an activity, it drew attention. You could have probably sold Old Dutch root beer and got the same attention. I was thinking when I was listening to the argument and the testimony, you know, what is it, what happens. What is it that you're attempting to provide. Whatever it was, the message was lost on those who were objecting to the traffic

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jams which they were angry about.

The plaintiff himself testified that he could only assume that his message was the reason the drivers were upset. I thought he was probably the more candid and credible witness that has been in this court for a good number of years. He certainly was followed by someone who picked up the slack for him, who couldn't answer a question appropriately and had the obsession that the only way that you can win is to tell them it's the message, it's the message, it's the message. No basis for it, just a general belief that it had to be. Well, it wasn't and there was no reasonable inference that the message was indeed the cause of the concerns which we're addressing.

Numerous drivers had to slam on their brakes for fear of colliding with the vehicles in front of them. Some near accidents and one actual accident was reported. After Sergeant Paulson heard numerous complaints about traffic safety, he requested advice from the District Attorney. She advised that the group was not entitled to stay on the overpass if its conduct was causing a safety hazard to motorists. Paulson testified he did not ask plaintiff to leave

the pedestrian overpass because of the message. He testified he asked him to leave because of the traffic hazard. He further testified that there had been no traffic -- had there been no traffic hazard, he would not have asked plaintiff to leave.

The policy as the Court sees it, until the new ordinance

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is published, everything goes. Every message may be brought to anyone's attention in the City of Madison. Everything goes, except where public policy is substantially at risk or, in this instance, where there is the severe damage that will be caused by the traffic jams and the problems with the freeway that we have out here. It certainly is crowded but it doesn't need to be crowded as it was as a result of the activity of the plaintiff.

So that's the narrow tailoring that I see. All messages are appropriate, except, except where the activity, except where the activity is such that it causes the traffic hazard as set forth in the first finding offered by the Court that plaintiff's display of a large banner and sign created a traffic hazard.

Now, there has to be a reasonable reaction to that, and there is a reasonable action. The reaction was find another site but not one similar to this on the Beltline. And, plaintiffs did find other sites, numerous sites; the farmer market, the green market, the Alliance Center, to name a few, neighborhood streets. There were many alternatives but the suggestion was, Well, our message isn't getting, getting across. Well, it's probably because you pick a poor venue. People are driving. They're interested in getting home from work or going to work or taking the kid to the doctor. They haven't got time to read your messages in the first place as it

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can be a better inference than the fact is they read them and that's what caused the trouble. It's not what happened at all.

The other inference is certainly more clear from that testimony which we've received.

Don't know if I've read this into the record as yet but I certainly was impressed by it when I made the finding as follows. On Saturday, October 11, defendant Grady stopped near the pedestrian overpass near the Park Street because of a traffic slowdown to 15 to 20 miles an hour. Approached the plaintiff's group on the overpass, asked them to leave because they were creating a traffic hazard, and his statement was, I never would have stopped had I not observed a traffic slowdown. That's pretty narrow tailoring. No interference whatsoever, nor was there any interference at the other sites which the plaintiffs have attempted and have used as a result of the fact that they do wish to provide their message.

The Court concludes that plaintiff was not banned from the overpasses by defendants Grady, Paulson, City of Madison, or any of the defendants because of the content of the message or the responses of the drivers to it. Number one, there was no suggestion even by the second witness who was so sure of everything. There was no suggestion that even that witness was of the opinion that the message -- the content of this message was the cause here and that that's the reason that plaintiff was told to leave. The fact is that it wasn't the message, it

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was the activity that was set forth on the overhead -- overpass which I suppose for better the Court will accept the word spectacle.

The ban was content-neutral because it was based on whether a traffic hazard occurred. Any group on a pedestrian overpass with signs or banners that create a traffic hazard would have been asked to leave the overpass. That seems to be agreed. No dispute on that. The ban was necessary to serve a compelling governmental interest. It was narrowly drawn to achieve that purpose of assuring the safety of motorists. And plaintiff had ample alternative

avenues to express his message. Plaintiff's First Amendment rights were not violated under Frisbee against Schultz, 487 U.S. 474 at page 480, a 1988 decision.

The Court provided you 21 pages the first time around and feels you're probably being shortchanged this time by a one-page memorandum made as a result of this trial. So then it starts talking about a few other things and it usually ought to stop doing that, but the fact is that the Court does believe that this memorandum does set forth all of the concerns which are presently before us.

There is one and that is the present ordinance. Don't believe that's before me. I'm not addressing the present ordinance. Don't know if you expect me to but I'm not, only because the Seventh said that if the City had a policy that

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prohibited not just Ovadal but all protests and all signs on all Beltline overpasses, this could certainly be a legitimate place and manner restriction because it would be clearly content-neutral. Don't know if that's the type of restriction you want, but whatever you pray for, Pastor, sometimes that's what you get and it isn't what you really want.

The fact is that the ban as I stated is none. Everything goes, except in this instance on overpasses and streets and similar forum. You know, you can't induce a traffic hazard. And it wasn't the message that induced it, it was the activity.

I'm talking now more for the record than I am for the purpose of continuing this discussion or for making findings of fact other than to state that I don't believe there's been anything to suggest in this entire record that the ban -- that the ban, it isn't a ban. It wasn't a ban. It was a temporary, Get out of here, please, people are subject to substantial damage in a traffic hazard which has been created. That's the reason that they were asked to leave. There isn't a ban. There's a ban now apparently, but it hasn't been published yet I'm now told. And the fact is that the people were asked to leave only because of the very narrow circumstances.

It was okay when you did it earlier this morning, it may be okay when you do it at the Monona exit where there isn't this type of concern, but the fact is you can't do it in rush hour. And I tried to make that point clear at the injunctive

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hearing but never got anywhere on that either. The fact is that you just don't -- you just don't keep doing this where you can see the incendiary activity that's going to occur as a result of your activity over these huge banners, whatever they are, which no one even suggested they had ever read, that is any motorist, but just looking up as they no doubt do and find those things and saying, you know, what are they. But is isn't the message that we don't like, it's the fact that we can't get home on time.

And I'm going to let you get home on time because I'm going now enter judgment in favor of the defendants against the plaintiff on the judgment dismissing the complaint and all claims contained therein with prejudice and costs.

Anything that either counsel wish to bring to the Court's attention at this time? Mr. Hellum,

MR. KELLUM: It's Kellum. No, Your Honor.

THE COURT: Kellum.

MR. KELLUM: No, Your Honor.

THE COURT: Ms. Rottier.

MS. ROTTIER: No, Your Honor.

THE COURT: All right, we'll stand adjourned for the day.

THE CLERK: All rise. Court stands adjourned.

THE COURT: Upon its examination of its findings, conclusions of law and uncontested facts, the Court reserves

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the opportunity to provide a supplemental memorandum where the record would so suggest.

(Proceedings concluded at 4:05 p.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

_____ 2/02/06

Susan Barsness Date
Certified Transcriptionist

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH OVADAL,

Plaintiff,

vs. Case No. 04-C-322-S

CITY OF MADISON, WISCONSIN; RICHARD WILLIAMS, in his official capacity as Chief of Police for the City of Madison, Wisconsin; CHRIS PAULSON, individually and in his official capacity as Sergeant for the City of Madison Police Department, and PATRICK GRADY, individually and as Police Officer for the City of Madison Police Department,

Defendants.

TRANSCRIPT OF PROCEEDINGS
FROM VIDEOTAPE

Date: September 2, 2003
Transcribed by: LINDA KUHLMAN

[2]

OFFICER FIELDS: You really can't be up here. You're obstructing traffic. We got a couple of calls on it. You really need to just take your protest someplace else.

MR. OVADAL: We've already been through the Town of Madison with federal courts, and your own department has told us -- we had to go through the Internet -- your own department – we had a sergeant come out -- first

we had two patrol officers said no, we can't have it, and then we had a sergeant come out and said absolutely, this is (inaudible).

OFFICER FIELDS: Not on the overpass, not during this time, not that I'm aware of, because you're disrupting traffic.

MR. OVADAL: We're not (inaudible) than that sign over there.

OFFICER FIELDS: Can we see an I.D, please?

MR. OVADAL: Why do you need I.D.? I think you've got my information, but I'm not --

OFFICER FIELDS: I just want to see I.D.

MR. OVADAL: I don't carry I.D.s around.

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OFFICER FIELDS: Why not?

MR. OVADAL: Why should I? I'm not in Communist Russia.

OFFICER FIELDS: Why do you want to make this --

MR. OVADAL: I can give you a (inaudible) --

OFFICER FIELDS: Wait, wait.

MR. OVADAL: -- 8551.

OFFICER FIELDS: Why do you want tomake this an issue? I don't get it.

MR. OVADAL: I'm not making it an issue, Officer. I'm just wondering why, why -- what is the problem? We've done this many times. In the Town of Madison we did have trouble, but that went into the federal courts and then they backed off and settled.

OFFICER FIELDS: You know what --

MR. OVADAL: It was during rush hour.

OFFICER FIELDS: -- I don't know anything about it.

MR. OVADAL: I know. I know.

OFFICER FIELDS: All I know is that we've gotten several calls from disgruntled people.

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You're causing a disturbance.

MR. OVADAL: That's called a --

OFFICER FIELDS: Wait, wait. No, no. If someone were disturbing you, you'd want me to do something about it, right?

MR. OVADAL: That's called a heckler's (inaudible) --

MR. FOHT: This is free speech. It always disturbs somebody.

MR. OVADAL: Mike, Mike, I'll take care of it. You need to tape.

OFFICER FIELDS: That's fine, but maybe off to the side or something. But where it's at right now it's causing a disturbance.

MR. OVADAL: Okay. Causing a disturbance, it's free speech. Free speech often causes people to be disturbed. I can show you any number of federal suits. And that's called a heckler's veto, Officer.

OFFICER FIELDS: I don't care about a heckler's veto, to tell you the truth.

MR. OVADAL: You have to, because the City of Madison does not want to go into federal court and lose lots and lots of money.

OFFICER FIELDS: I don't -- you know

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what --

MR. OVADAL: Are you ordering us to leave this bridge?

OFFICER FIELDS: I'm asking you to please take your protest someplace else because of (inaudible).

MR. OVADAL: (Inaudible)

OFFICER FIELDS: You know what, I understand this.

MR. OVADAL: Okay, good.

OFFICER FIELDS: I honest to God understand this. The problem is what if – all right. I have to look at the greater good here, right? What if your signs suddenly caused someone to have an accident out there. That's what I need to prevent.

MR. OVADAL: They're not --

OFFICER FIELDS: The greater good here deals with people getting into a crash, and if one person crashes here or two people crash, it's going to be a multi-car pileup.

So you know what, you have the right to assemble. You have the right to see your point of view, and I respect that and I understand it, but all I'm asking is right now while this is going on,

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while rush hour is going on -- and I understand that this is your high time, your high visibility time, but it's also the time when things can get really hazardous.

MR. OVADAL: You're saying the reason you want us off is because people complained?

OFFICER FIELDS: Right.

MR. OVADAL: All right.

OFFICER FIELDS: But I'm asking you common sensewise for the greater good, all right. Can you see my point of view --

MR. OVADAL: (Inaudible) we've done it many times in many cities, never. I look at all the billboards, I look at -- you know what I'm saying?

OFFICER FIELDS: Please, I'm asking you to please just move it off to the side, move it somewhere else.

MR. OVADAL: We're only going to be another (inaudible).

OFFICER FIELDS: But I'm asking you now, please.

MR. OVADAL: Are you ordering me?

OFFICER FIELDS: Why would I order

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you when I'm asking you?

MR. OVADAL: Well, because there's a difference. If you ask me, I'm going to say no because we're staying, because we have a right to under the First Amendment. If you order me under the threat of arrest, then I suppose I'll have to go.

OFFICER FIELDS: Where are you folks from?

MR. OVADAL: I'm from Monroe. There's people from Scotland, England and Ireland that are just visiting (inaudible) First Amendment.

OFFICER FIELDS: And that's fine. I'll tell you what --

MR. OVADAL: Could you just check for me, please.

OFFICER FIELDS: I'm going to check, but I'll tell you what, if my boss tells me you've got to go, then you've got to go.

MR. OVADAL: Well, yeah.

OFFICER FIELDS: Okay, then we're clear.

MR. OVADAL: That's your boss. (Inaudible)

MR. OVADAL: (Inaudible) lieutenant?

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OFFICER: Police, patrol officer.

MR. OVADAL: Patrol officer, because I'd like a sergeant down here. So you're both patrol officers? Can I get a shift sergeant down here maybe?

OFFICER: (Inaudible)

MR. OVADAL: (Inaudible)

OFFICER: I'm sorry, what?

MR. OVADAL: I'd like a sergeant. You guys aren't in charge here. I'd like a sergeant. Can I get a sergeant down here (inaudible)?

OFFICER FIELDS: I'll get you a sergeant, but what I'll ask you to do is just move to the side until the sergeant gets here. If he says you're okay to assemble up here, that's fine. I just don't feel okay with it with traffic.

MR. OVADAL: Well, we're only going to up here for the next (inaudible) so we'd like to stay.

OFFICER FIELDS: Listen, I don't want to get into --

MR. OVADAL: I know.

OFFICER FIELDS: I don't want to get into this war of words with you here because

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basically what can end up happening is someone can get excited or something like that. I want to avoid that.

MR. OVADAL: So we have to leave because people complained?

OFFICER FIELDS: I've got a reverend or someone here who's demonstrating against homosexuality on the bypass. We got several calls on this saying it's distracting people in traffic. I've asked them to leave. They're telling me they have a right to assemble (inaudible) and this has happened with the Town of Madison and (inaudible).

MR. OVADAL: This is (Inaudible)

OFFICER FIELDS: Get his name.

MR. OVADAL: Huh?

OFFICER: He was talking to me.

OFFICER FIELDS: Yeah, they're in the middle of the overpass.

OFFICER: Can I get your name?

MR. OVADAL: Ralph, R-a-l-p-h.

MR. OVADAL: R-a. (Inaudible)

OFFICER FIELDS: (Inaudible)

(Inaudible radio call)

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OFFICER FIELDS: I got it. They have an opening, so it's not a problem for people moving in between them. All right. I copy. I'll deal with it. I'll (inaudible) report. Copy (inaudible). All right.

He says you stay, so you stay. Which church are you with?

MR. OVADAL: (Inaudible)

OFFICER FIELDS: (Inaudible)

MR. OVADAL: (Inaudible) this is actually -- I'm at the church but this is (inaudible) to give you some idea.

OFFICER FIELDS: Okay. Okay. As long as you're leaving a pathway open for people they're telling me that it's okay.

MR. OVADAL: We can (inaudible)

OFFICER FIELDS: All right. See you later.

MR. FOHT: Thanks.

(Break in taping)

OFFICER FIELDS: Sir, I'm going to ask you to disburse, and I figured you're pretty close to leaving now anyway, right?

MR. OVADAL: Well, we were going to and then the traffic started to go so slow, this is

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perfect. So it's safe.

OFFICER FIELDS: No. We're talking about westbound. So the sergeant's name is Chris Paulson. I'm asking you right now to disburse.

MR. OVADAL: So you are ordering us to take the signs down?

OFFICER FIELDS: Correct.

MR. FOHT: Under threat of arrest or --

MR. OVADAL: Citation.

OFFICER FIELDS: Citation.

MR. OVADAL: So can you just say it.

OFFICER FIELDS: I'm ordering you to disburse under threat of citation. I'm Officer Curt Fields, IBM 2538, Madison Police Department. Okay. Is that enough?

MR. OVADAL: We can't stay up here?

OFFICER FIELDS: No. That's what my sergeant says.

MR. OVADAL: Why the change?

OFFICER FIELDS: Because he got reports of two near crashes on the Beltline which is what I warned you about.

MR. OVADAL: Well, that happens all the time, near crashes on the Beltline.

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OFFICER FIELDS: Okay. They're saying it's because they were looking up at the signs.

OFFICER FIELDS: Okay. So you're saying motorists are saying, "I had a near crash and I was looking at the signs." So you're going by what the motorist says, correct?

OFFICER FIELDS: Yes.

MR. OVADAL: Okay. So you don't believe that there's people out there that want us to take this message away and the way they're trying to do it is say, "Hey, I almost crashed looking at signs" --

OFFICER FIELDS: Reverand Ovadal --

MR. OVADAL: You see what I'm saying?

OFFICER FIELDS: -- you and I both know that the abortion, the homosexuality, whatever the issue is, you will have opponents and proponents. I'm not here to judge.

MR. OVADAL: Right. I know. I know.

OFFICER FIELDS: I'm here to handle the public safety, and right now my sergeant is telling me that's being jeopardized, so please.

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MR. OVADAL: What I'm saying -- the only thing I wanted to clarify is, so there have been several people called in and claimed they were almost in a near crash because of the signs and then they --

OFFICER FIELDS: And that's why I gave you my sergeant's name. You can take it up in detail with him.

MR. OVADAL: I will. I just wanted to know. So I just wanted to make sure we get this clear.

OFFICER FIELDS: Correct.

MR. OVADAL: So people called in?

OFFICER FIELDS: Correct.

MR. OVADAL: The police did not observe any near crashes, the people called in?

OFFICER FIELDS: I didn't observe anything, Mr. Ovadal, but I am under orders right now to have you disburse.

MR. OVADAL: Yeah, I know.

OFFICER FIELDS: So please.

MR. FOHT: Are there any name of people that called in or is this just anonymous?

OFFICER FIELDS: Of course I don't have that right now.

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MR. OVADAL: It's just an anonymous tip that said hey --

OFFICER FIELDS: You know, that's why I gave my sergeant's name. You can take it up in detail with him. You can work something out maybe through city data to possibly get somebody to --

MR. OVADAL: But I want something for the record, because they're citizens, I'm a citizen, and I can tell you and everyone here will tell you there was no near crashes. You have all these witnesses that will tell you there hasn't been one single near crash, nothing.

OFFICER FIELDS: Reverand Ovadal --

MR. OVADAL: Do you see what I'm saying, though?

OFFICER FIELDS: I conceded that if -- you made your point.

MR. OVADAL: You see what I'm saying?

OFFICER FIELDS: I saw that you had a valid point, but now, all right, I'm being told that --

MR. OVADAL: What about the sergeant?

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OFFICER FIELDS: -- the public safety is in jeopardy. He can't make it over here from the south side station.

OFFICER FIELDS: What I'm telling you is there have been no near crashes. It's a lie.

OFFICER FIELDS: I will note that because I'm doing a report on it.

MR. OVADAL: It's a lie.

OFFICER FIELDS: I will note that I came back. I will note that we spoke. You said that that was a lie, but I will say that that's the reason that I came back. That's the reason -- I wasn't even -- I didn't come back on my own. I was ordered to come back.

MR. OVADAL: Oh, yeah, there's nothing personal here. I'm just trying to get some stuff on the record, because, I mean, the last time this happened we --

OFFICER FIELDS: And --

MR. OVADAL: I know. I know. the last time this happened we had to go back to federal court and the city settled out of court. It was Town of Madison. Because it doesn't matter if someone says --

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OFFICER FIELDS: I'll tell you what. If you're okay with the fact that, you know, there's no crashes coming in, that's fine. What I have to go by is what I'm told. I'm told that they've had some near collisions going on. There's a threat to the public safety. That overrides your protest right now. Okay. I understand your First Amendment rights. I respect them, but we need to basically move this thing along.

MR. OVADAL: Okay. But the bottom line is this --

OFFICER FIELDS: All right. Can you please move it along.

MR. OVADAL: The bottom line is his --

OFFICER FIELDS: We can talk on the other side.

MR. OVADAL: There's a constitutional instrument involved here.

OFFICER FIELDS: Okay.

MR. OVADAL: And this could be done at any time. I mean, you can say anything you want. Now, wait a minute. I've got to tell you one more thing.

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OFFICER FIELDS: (Inaudible) folks over here.

MR. FOHT: No.

OFFICER FIELDS: Okay. Can we just get everybody moving --

MR. OVADAL: Okay, the bottom line is --

OFFICER FIELDS: Can we just get everybody moving in this direction.

MR. OVADAL: Can I tell you that there will be a federal lawsuit if we have to move.

OFFICER FIELDS: Then you can take it up with Sergeant Chris Paulson.

MR. OVADAL: Can I tell you that individual officers are also liable in these cases if there's arrests.

OFFICER FIELDS: Okay. That's fine. I'm just asking you right now to move your folks.

MR. OVADAL: Because that's what (inaudible).

OFFICER FIELDS: Mr. Ovadal --

MR. OVADAL: Can I talk to your sergeant? I'd like him down here.

OFFICER FIELDS: I'll tell you what, when you move your people to the other end down

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here, we will wait. But I'm told to move your folks this way.

MR. OVADAL: Can you call him now and ask him? I want a sergeant.

OFFICER FIELDS: I'll tell you what --

MR. OVADAL: I'd like to ask the sergeant.

OFFICER FIELDS: When I see some cooperation on your part that we're moving these folks -- and I'll get you a sergeant, but I need them off now.

MR. OVADAL: I'll take that side then. This side nobody is even -- they're moving. That's a --

OFFICER FIELDS: Mr. Ovadal.

MR. OVADAL: Look. Film that. Look. (Inaudible)

OFFICER FIELDS: Mr. Ovadal, please, I'm being told --

MR. OVADAL: I know what you're being told, but I do not want to go into federal court if I don't have to. Why should the city be going to federal court?

OFFICER FIELDS: All right. Then

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we've been told to identify -- right now I've got your name, and that's all I need. Now we're being told to take down the individuals --

MR. OVADAL: We're being told to move under threat of arrest, correct?

OFFICER FIELDS: Citation.

MR. OVADAL: But if we don't take the citation that's --

MR. FOHT: What's going to be the citation?

MR. OVADAL: Just wait, Mike. What's the citation, number one?

OFFICER FIELDS: It's going to be for disorderly conduct.

MR. OVADAL: Okay. Disorderly conduct based on some people called in and said it was --

OFFICER FIELDS: They were disturbed by your actions and caused near collisions.

MR. OVADAL: Okay. They were disturbed by my -- okay, I'm not trying to (inaudible) you, and number two is citations.

OFFICER FIELDS: Correct.

MR. OVADAL: And then if we don't pay the citation.

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OFFICER FIELDS: Then you'll be -- a warrant will be issued for your arrest.

MR. OVADAL: So we're looking at jail if we don't move?

OFFICER FIELDS: Right.

MR. FOHT: What -- you said by our actions. What were our actions, picketing, you mean?

MR. OVADAL: Okay. He's saying by the complaints.

OFFICER FIELDS: By the complaints. (Inaudible)

MR. FOHT: Because of our picketing?

MR. OVADAL: No.

OFFICER FIELDS: Mr. Ovadal --

MR. OVADAL: Anonymous complaints.

OFFICER FIELDS: We may have to start identifying people.

OFFICER CUMMINS: Yeah.

MR. OVADAL: We're going to leave, but we're going to file a complaint -- federal charges.

OFFICER CUMMINS: Sir, there hasn't only been a couple --

MR. FOHT: Can we get a card from

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you, too?

OFFICER CUMMINS: -- complaints, there's been several, several complaints. Okay.

MR. OVADAL: There's always complaints, ma'am.

OFFICER CUMMINS: And right, right. But I'm not saying -- we didn't just come up here because of one complaint. Okay. I mean, there's several complaints about this --

MR. OVADAL: I have nothing personal against you, ma'am.

OFFICER CUMMINS: I understand that.

MR. OVADAL: I guess the only point I tried to make is we haven't seen a single -- I mean, it's like why

would my -- as a citizen why wouldn't I have as much weight as these anonymous complaints. I'm standing in front of you.

OFFICER FIELDS: Mr. Ovadal, Mr. Ovadal, we need you to move.

MR. OVADAL: (Inaudible) Okay. We have to move under threat of arrest and jail. All right. Now we're going to federal court. Wait a minute. Would you tell each person for me that they have to leave, because I will feel better about that.

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OFFICER FIELDS: Yeah, you do.

MR. OVADAL: I don't like --

OFFICER FIELDS: We've been ordered to come back and ask you to disassemble, all right, and move to the side. Once we're down -- and I'll tell you down here, but right now my sergeant is telling me that you have to disassemble up here --

MR. OVADAL: Or you'll be arrested.

OFFICER FIELDS: All right. So -- let's go.

UNKNOWN SPEAKER: Are we going to be arrested, sir?

OFFICER FIELDS: Cited. Let's go.

UNKNOWN SPEAKER: Did we get their numbers?

MR. OVADAL: Yeah, I did.

UNKNOWN SPEAKER: I'm going to speak to the American Consulate.

OFFICER FIELDS: Hold on.

MR. OVADAL: Wait a minute. Hold on. We're going to court now but I don't like leaving.

OFFICER FIELDS: Okay. Come on. We're going to move this way. I'm going to call my sergeant for you.

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MR. OVADAL: Well, it's too late now. If I have to leave this bridge under threat of arrest, then we're going into

federal court. Once we leave this bridge, it's federal court. That's it.

(Inaudible)

MR. OVADAL: You want us off, right? We're in federal court, that's it.

MR. FOHT: Is he saying wait now? Is he saying wait now?

(Inaudible)

UNKNOWN SPEAKER: He's told me that I was -- (inaudible)

MR. OVADAL: Hold on, hold on. Just wait now.

UNKNOWN SPEAKER: I needed some money anyhow.

MR. FOHT: He's telling us to wait. We don't want to go into federal court. We don't. Let us go on our own volition, that's fine.

MR. OVADAL: We have several people, anonymous tips that said they almost got in an accident but I'm saying we -- (inaudible). So we're all citizens, too.

OFFICER FIELDS: (Inaudible) I want

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to make sure I'm very clear on what the sergeant wants me to do.

MR. OVADAL: We have to get everybody's name. I've got his.

MR. FOHT: He's waiting, Ralph, so let's just see what he says.

MR. OVADAL: I need cards from each officer.

OFFICER FIELDS: Sarge, I'm getting them to disassemble based on the complaint (inaudible) disorderly conduct (inaudible) but now one of the other officers told me to hold off on that (inaudible).

MR. OVADAL: Do we have the sergeant's name?

MR. FOHT: Yeah, it's on the tape, but I'd like to speak to him personally or you would.

MR. OVADAL: Well, if you've got it clear on tape so we know who is responsible.

UNKNOWN RADIO CALLER: (Inaudible) actions. I'm waiting for a call back from the on-call DA, so just maintain your presence at this point, Curtis, and someone will be with you guys very shortly. I'm en route to your location.

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However, I'm in heavy traffic quite a ways off.

OFFICER FIELDS: Okay. I copy. He said -- hey, Mr. Ovadal, Sergeant Paulson says to stand tight and if you want to put the signs up, feel free but he --

UNKNOWN RADIO SPEAKER: (inaudible) he's extended them every opportunity for them to leave peacefully as far as, you know --

MR. OVADAL: We're going to --

UNKNOWN RADIO SPEAKER: -- alerting them to the fact that this is potentially creating a traffic hazard, et cetera, and they're just not willing to cooperate at all, is that correct?

OFFICER FIELDS: All right. They're reluctantly cooperating. I've informed them as to our calls, stating that we had near collisions based on their protest and they're saying that that's not true. That it's a lie. That they didn't witness any slow downs or near crashes while they've been up here.

UNKNOWN RADIO SPEAKER: Okay. I copy.

OFFICER FIELDS: All right. We wait here, and he's coming.

MR. OVADAL: So we set up again or

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we walk off?

OFFICER FIELDS: Now he's telling me to stay right here and wait for him.

MR. FOHT: So we can set up?

OFFICER FIELDS: Yep.

MR. FOHT: Okay.

MR. OVADAL: Well, we're going to (inaudible).

MR. FOHT: Do you want them to set up again?

MR. OVADAL: Yeah, just set them up for awhile.

MR. FOHT: Okay. Set it back up again while we wait for the sergeant. Set it back up. Yeah, you can set it back up.

OFFICER FIELDS: Mr. Ovadal, there's nothing personal in (inaudible).

MR. OVADAL: (Inaudible) that's why we don't -- we have billboards all over the place. We have people running, jogging alongside the road. It's part of living in a free society. People have to control their vehicles and be careful. You can't sterilize society. Now, if we were at some intersection, you know, setting up signs, and I've seen people do

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that, and it's bad visibility, that's stupid. You see, this is actually safer. You're not off the road. You're straight ahead and instead of looking like this, they can just look up. (Indicating)

OFFICER FIELDS: Mr. Ovadal, you have the right to maintain (inaudible). You're free to protest under the First Amendment. I'm not here arguing that.

MR. OVADAL: I'm not arguing. I was just making conversation.

OFFICER FIELDS: The only reason me and my fellow officers are here is because there's threat to the public safety. That's it. That overrides everybody's protest or what have you.

MR. OVADAL: Well --

OFFICER FIELDS: The laws in our state it overrides --

MR. OVADAL: It overrides me.

OFFICER FIELDS: I can't (inaudible).

MR. OVADAL: Yeah. Going by what you're saying there would be no picketing whatsoever anywhere. You couldn't have a labor picket over there with big signs because someone might get distracted.

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OFFICER FIELDS: I'm not talking about a labor picket. I'm talking about you (inaudible).

MR. OVADAL: Come on now. You've been around Madison a while, right? You've seen the anti-war protesters.

OFFICER FIELDS: (Inaudible)

MR. OVADAL: I'm not hollering at you. Don't get (inaudible).

OFFICER FIELDS: I am, sir.

MR. OVADAL: Why?

OFFICER FIELDS: Because you're talking (inaudible).

MR. OVADAL: I'm not mad at you.

OFFICER FIELDS: (Inaudible)

MR. OVADAL: Okay. I'm not mad at you.

MR. FOHT: There's a counter-protest own there now, too. See, right here, some other people that are down there, too.

MR. OVADAL: You've seen all the different protests. You see -- suddenly a few guys like us with these signs, okay, suddenly this is a hazard that has to be removed.

OFFICER FIELDS: No, I didn't remove

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you. I could.

MR. OVADAL: Well --

OFFICER FIELDS: (Inaudible)

MR. OVADAL: I think it's content based.

OFFICER FIELDS: Then you can talk to the sergeant about it.

MR. OVADAL: Well, I'm starting to get suspicious. You don't think that's not distracting to many drivers? (Indicating)

OFFICER FIELDS: I don't know. I mean, I really don't. It doesn't distract me. I go to work every day.

MR. OVADAL: I mean, did this distract you? Would it cause you to crash?

OFFICER FIELDS: I was in traffic in the first slow up. I saw you and I actually thought there was a crash. There's been a (inaudible) in traffic.

MR. OVADAL: Have you seen any near crashes?

OFFICER FIELDS: Okay. I haven't seen any near crashes. I did see a slow up. I was in it.

MR. OVADAL: It wasn't from us.

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OFFICER FIELDS: I'd imagine it was. I was on that side approaching here. You were already visible. Traffic sped up (inaudible).

MR. OVADAL: You're saying the slow up is enough to crash a person.

OFFICER FIELDS: No. No. (Inaudible) the first time.

MR. OVADAL: I mean, you're a really good guy. You seem to be a really efficient police officer. The kind of police officer that I (inaudible). We appreciate police officers. Where would we be without them. But you are on extremely shaky legal ground.

OFFICER FIELDS: That's why the sergeant is coming and that's why the D.A. is involved.

MR. OVADAL: It's just very shaky, you know what I mean, and I could take (inaudible). It's just that when you were trying to remove us, obviously, (inaudible) because I think I'm right. Do you know what I'm saying?

OFFICER FIELDS: Well, if my sergeant tells me to remove you, then that's what I'm going to do.

MR. OVADAL: All right. Where do

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you think he is?

OFFICER FIELDS: He's stuck in traffic.

MR. OVADAL: By the time he gets here we may be already off the bridge.

OFFICER FIELDS: (Inaudible) by the time I got here and (inaudible).

MR. OVADAL: I was going to, but the traffic is so extremely slow. It's hard to turn this down, because we want to get a message out and --

OFFICER FIELDS: I understand.

MR. OVADAL: -- we need to get out here (inaudible).

OFFICER FIELDS: I understand. Okay. I see your point.

MR. FOHT: Like he said, we've got people from the UK over here. We've got people from Scotland, Northern Ireland, different places. So you know, we're trying to get as much ministry in as we can here. We're only going to be here for a short time so.

OFFICER FIELDS: You know what, I truly do understand.

MR. FOHT: We weren't just doing it

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to spite you, is all I'm saying.

OFFICER FIELDS: No, no.

MR. OVADAL: Let's wait for the sergeant.

OFFICER FIELDS: Any time you get people and their beliefs and their faith combined it becomes volatile. All right. All I'm trying to do is I'm trying to appeal to the public safety aspect and things like that.

I'm not disputing the fact that, you know, you have the right to assemble. You have the right to worship. You have the right to your opinions. That's -- I'm all for that.

MR. OVADAL: (Inaudible) get killed (inaudible) but I haven't seen even anything close to volatile (inaudible).

OFFICER FIELDS: Okay. I'm just -- I know what you're saying. I just don't have that leeway (inaudible).

MR. OVADAL: Huh?

OFFICER FIELDS: I don't have that leeway. If someone says that this is an issue, then I have to take it at that and investigate it further. But, you know, it's okay. We're fine until he gets here.

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MR. OVADAL: Right.

MR. FOHT: I want to go down here and videotape this.

MR. OVADAL: We're going to go pretty soon.

MR. FOHT: They've got a counter -- (Break in taping)

MR. OVADAL: Oh, I know he is. (Inaudible)

OFFICER FIELDS: I mean, if there's an issue with folks being on here. (Inaudible) leave a number (inaudible) otherwise he's got --

UNKNOWN WOMAN: My daughter and I (inaudible). Don't take our picture.

UNKNOWN SPEAKER: What's going on?

UNKNOWN WOMAN: My daughter and I (inaudible).

(Inaudible)

UNKNOWN SPEAKER: (Inaudible) free speech, free speech, free speech.

OFFICER CUMMINS: Sir, okay, so this is all legal, okay, until (inaudible) been harassing people or making other people feel uncomfortable.

UNKNOWN SPEAKER: She's not

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harassing me.

UNKNOWN WOMAN: This guy is taking our picture. I don't know who he is. I don't know what the story is (inaudible).

OFFICER CUMMINS: Sir, can you please stop videotaping because she does not want to be videotaped right now.

MR. FOHT: No. Because as far as this is for -- if we were ever to have to go into court, this would be evidence that would -- you know, any judge would be able to see what has happening, you know. That's why --

OFFICER CUMMINS: She is not giving you permission right now to tape her.

MR. FOHT: This is a public area -- in the public arena you can take anybody's picture. You know, I'm not doing it to harass her. I'm doing it for court.

OFFICER CUMMINS: (Inaudible) sign and that's fine. I don't have any problems with that.

UNKNOWN SPEAKER: We have a right to be here.

UNKNOWN WOMAN: We're not trying to start trouble.

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(Inaudible)

UNKNOWN SPEAKER: You can stand there all day. It's fine with me.

MR. FOHT: Do you just want him to move down a little bit, is that what the big deal is here?

OFFICER CUMMINS: That would be great.

MR. FOHT: Why don't we just do that. Okay. Will that solve everything and then we can --

OFFICER CUMMINS: And then don't talk to each other.

UNKNOWN SPEAKER: (Inaudible) she's not harassing me.

OFFICER CUMMINS: No, you're the one that's actually being (inaudible)

UNKNOWN WOMAN: (Inaudible)

OFFICER CUMMINS: Sir, if you could move down a little bit, please.

UNKNOWN SPEAKER: Just move --

MR. OVADAL: Just down here is fine.

OFFICER CUMMINS: Just leave her alone.

UNKNOWN SPEAKER: She's a very nice

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lady actually.

(Break in taping)

OFFICER FIELDS: All right. I'm ordering you off the bridge under threat of arrest.

MR. OVADAL: Is the (inaudible)?

OFFICER FIELDS: He's coming but he's stuck in traffic. He's telling me that those are my orders.

MR. OVADAL: Okay. Did you ask him -- see --

OFFICER FIELDS: I will give you a case number which will have all our names and everything and all that information.

MR. OVADAL: That's all right. And then also tell (inaudible) before he does this to check, there's a federal case in Virginia did the very same thing and it cost a lot of money.

OFFICER FIELDS: You know what, I understand, but I'm going by what he said. He checked with the DA's office. The DA's office said based on circumstances that we're currently operating under, we're ordering you off the bridge.

MR. OVADAL: Okay. So now there's heavy traffic. Okay. So under threat of arrest everyone has to leave the bridge because there have

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been several anonymous complaints.

OFFICER FIELDS: Mr. Ovadal, that is correct.

MR. OVADAL: All right. Pack it in and let's head for federal court.

(Inaudible)

MR. OVADAL: You know what, I just need your card, if I can get that.

OFFICER FIELDS: I gave you my name (inaudible).

(Inaudible)

MR. OVADAL: All right. We've got to go or we'll be arrested.

OFFICER FIELDS: Actually you've got me on tape. I gave you my name --

MR. OVADAL: All right.

OFFICER FIELDS: -- on tape.

MR. FOHT: But it will still help to have a card.

MR. OVADAL: all right. Under threat of arrest.

(Inaudible)

MR. OVADAL: Now, these guys down here have to leave, too, right?

MR. FOHT: Yeah. Do those people

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have to leave, too?

OFFICER FIELDS: I will deal with them as soon as I'm done dealing with you.

MR. FOHT: Well, we want to see. I'll stick around then. We'll just stay and watch because we want to see them arrested, too.

(Inaudible)

MR. OVADAL: We're going to stay here and watch. We won't show the signs.

OFFICER FIELDS: Mr. Ovadal, okay, but keep your people moving this way. You can turn around and look --

MR. OVADAL: No. We're not going to show the signs, and I have every right to stand on this sidewalk, sir. Please do not order me off a public sidewalk.

OFFICER FIELDS: Mr. Ovadal, I'm telling everybody to get off the bridge.

MR. OVADAL: I can not walk on this bridge?

OFFICER FIELDS: You can walk that way off this bridge.

MR. OVADAL: Can I come back?

OFFICER FIELDS: Without all the signs and everything, yes.

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MR. OVADAL: This is what I'm going to do. I'm going to have a few of these fellas take all the signs off and then a couple of us are going to stay because we want to see that.

OFFICER FIELDS: That's fine. You know what, I'm okay with that.

MR. OVADAL: Okay.

OFFICER FIELDS: A few of you take the signs. The rest of you can stay.

(Inaudible)

OFFICER FIELDS: I'm going to ask you to go that way, okay. Thank you. (Inaudible)

MR. OVADAL: Could I -- is it okay to set up signs along the road?

OFFICER FIELDS: Mr. Ovadal, I'll make you a deal. My sergeant is still en route. Once you get your guys off the bridge --

MR. OVADAL: I don't know when he'll arrive.

OFFICER FIELDS: He'll show up down here and then you can talk to him mano a mano (inaudible).

MR. OVADAL: (Inaudible)

OFFICER FIELDS: (Inaudible)

[40]

MR. FOHT: I say let's just go. They've threatened us. We've had to leave. Now we can't picket.

(Inaudible)

MR. OVADAL: (Inaudible) I'm not looking for a legal opinion out of you. I'm just telling you that (inaudible) Virginia, Town of Madison, several others. It's just very (inaudible).

OFFICER FIELDS: And it was the same stuff, you're saying?

MR. OVADAL: It might be dangerous, distracting to others. (Inaudible)

MR. FOHT: I've personally been on this bridge five times with officers I've talked to and have never had a problem with it.

MR. OVADAL: At the same time. Well, I really wanted to stay longer.

MR. FOHT: At the same time, yeah.

MR. OVADAL: I really wanted to stay longer with all these cars. We're being deprived, and I've got all these people from other countries that are leaving in two days and now they're not going to be able to do what they set out to do

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anyway.

UNKNOWN SPEAKER: (Inaudible) with the American Embassy when we get back.

MR. OVADAL: I doubt it. Well, that just messes up our whole ministry because some anonymous people said -- made a false claim.

(Inaudible)

(Break in taping)

OFFICER FIELDS: Sir, can I get your name, please?

MR. FOHT: Sure. It's Michael Foht, 4-13-67.

OFFICER FIELDS: Hold on, Michael.

Okay.

MR. FOHT: In fact, I was a member of the other -- the federal lawsuit. In fact, I was the one that brought it against the Town of Madison.

OFFICER FIELDS: That's fine, Mike. Last name, please.

MR. FOHT: It's Michael J., and it's F-o-h-t. Birth date is 4-13-67.

SERGEANT PAULSON: Hi.

MR. OVADAL: Hi.

SERGEANT PAULSON: How are you guys?

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MR. OVADAL: Pretty good.

MR. FOHT: It's N2097 --

SERGEANT PAULSON: I'm Sergeant Paulson.

MR. OVADAL: Pastor Ovadal.

SERGEANT PAULSON: Okay. Nice to meet you. I understand you agreed to leave the building or the premises here. I appreciate that.

MR. OVADAL: Well, we didn't really agree. He said he'd arrest us.

SERGEANT PAULSON: Well, yeah, absolutely.

MR. OVADAL: That's a violation of our civil rights under the Federal Civil Rights Act of 1964.

SERGEANT PAULSON: Well, here's where I'm coming from. We support freedom of speech here, okay, we do.

MR. OVADAL: Well, you didn't here.

SERGEANT PAULSON: Freedom of speech does not cart blanche give you the lawful right to go up on this overpass when traffic is coming 65 miles an hour and demonstrate. Okay. Because we had multiple calls to 911 from people that --

MR. FOHT: (Inaudible)

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SERGEANT PAULSON: -- that are saying they had to slam on their brakes or slammed on their brakes and it's almost caused accidents. Okay.

MR. OVADAL: We didn't see that.

SERGEANT PAULSON: Well, I'm telling you we have calls on that. Okay.

MR. OVADAL: I know. I know.

SERGEANT PAULSON: What I'm saying is you're free to demonstrate, absolutely. The Madison Police Department has always supported the freedom to demonstrate.

The reality is this is an overpass of a highway where the average speed is 65 miles an hour. We're getting calls, we're having a traffic snarl, we're having all of that.

That's the reason the officers instructed you off the bridge, and at this point we are not going to be charging anyone, okay, with any crime.

What I want you to understand is, again what I'm telling you is on this particular overpass --

MR. OVADAL: I hear what you're saying.

SERGEANT PAULSON: -- that would

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be -- we would arrest you for disorderly conduct.

MR. OVADAL: All right. And what I'm telling you is, number one, I was told those were just some anonymous calls. We saw no near crashes. You've got all these citizens. There were no near crashes, number one.

Number two, we have secured this right in the Town of Madison. We went to federal court and settled out of court, same situation, same Beltline.

Number three, it's gone into other federal districts around the country, same situations, and always the right was upheld to display those signs. You have billboards all along this road. You don't order them to take those down.

I think -- is this content based? Because what this is is a heckler's veto. Someone doesn't like it, they say, "Hey, I almost had a near crash. Tell them to get out of there," and you guys are doing it.

We're telling you there was no near crashes. Is this content based?

SERGEANT PAULSON: No.

MR. OVADAL: Because the people calling, I'll guarantee you, were giving us the

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finger and screaming. It's content based.

SERGEANT PAULSON: If I had people up there -- and I'm a huge supporter of the Green Bay Packers. Okay. If I've got people up on that bridge waving Green Bay Packers signs and I'm getting calls from citizens saying that they're having to slam on their brakes or that they are

slamming on their brakes and I have an officer that can see that people have had to brake or are braking, on this particular Beltline, no, they would be off the bridge. Okay.

MR. OVADAL: The Green Bay Packers --

SERGEANT PAULSON: So it's not content based.

MR. OVADAL: -- that's not covered by First Amendment. This is. This is religious speech. This is religious liberty. I'm telling you, look --

SERGEANT PAULSON: I hear you, man.

MR. OVADAL: -- nothing personal, okay.

SERGEANT PAULSON: No, I hear you.

MR. OVADAL: If I can get your card.

SERGEANT PAULSON: You bet,

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absolutely.

MR. OVADAL: It's absolutely nothing personal, but I'm telling you -- I'm just trying to tell you this has gone through the federal courts, same conditions.

You're saying 65. Well, when we were ordered off the cars were crawling at about five miles an hour. There was no 65. And then I even said, well, you know, we want to keep this side for sure, how about just this side, five miles an hour. No, you have to go.

Then I said, well, can we just stand here. We rolled up our signs, can we just stand awhile. They said no, you have to go off the bridge. You can't even -- even if you just rolled up a banner, you can't stand. I was ordered off a public sidewalk and I'm just holding it.

SERGEANT PAULSON: Sir, I have made my decision. Okay. I understand. I made a decision. We can agree to disagree, but what I'm telling you --

MR. OVADAL: I wish I could, but I can't agree to disagree.

SERGEANT PAULSON: Okay. Well, I hear what you're saying. I made a decision.

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MR. OVADAL: Okay. Can I say one other thing?

SERGEANT PAULSON: You bet, absolutely.

MR. OVADAL: I have people from three different countries that came out here. We're doing ministry with them. They're going back in a couple of days.

You just deprived us of our First Amendment rights on this ministry outing and you just stripped us of it because somebody said, "Oh, we don't think they should be up there," a citizen, "we think it's dangerous."

SERGEANT PAULSON: It's my decision. Okay. I will give you my business card. I don't have a business card. Okay. But I do have this. You can look to see. My name is Sergeant Chris Paulson. Okay. I'm on camcorder tape here. I'll give you my name. These officers can attest that's my name. They can also attest that this is my decision. Okay. All right. The officers will testify --

MR. FOHT: Can you ask a captain -- can you ask a captain about this?

SERGEANT PAULSON: Okay. There is

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no captain. This is my decision. Okay.

MR. FOHT: Or a lieutenant.

SERGEANT PAULSON: Nope. No. I made a decision. Okay. Again, I hope we can appreciate that I have to make decisions. Okay. I'm out in the field. I have right now eight officers that are patrolling a population of about 100,000 people. Okay. I have to make decisions in the best interest of public safety. I've made my decision. Okay.

MR. OVADAL: You can't violate the Constitution.

SERGEANT PAULSON: Okay. I understand.

MR. OVADAL: I wish you had called the Town of Madison. They would tell you don't do this.

SERGEANT PAULSON: Okay.

MR. OVADAL: I don't want to get involved with a federal lawsuit.

SERGEANT PAULSON: Okay.

MR. FOHT: See, the problem is --

SERGEANT PAULSON: I understand.

MR. OVADAL: I want to be on that bridge.

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SERGEANT PAULSON: Well, I'm telling you that -- no. You have the right to demonstrate.

MR. OVADAL: When can I be on that bridge?

SERGEANT PAULSON: We will actually facilitate --

MR. OVADAL: When can I be on that bridge?

SERGEANT PAULSON: When can you be on that bridge?

MR. OVADAL: Ever? Can I be on it at 4 in the morning tomorrow morning? Can I be on it at 3 in the morning? Could I be on it at noon? Can I ever be on that bridge?

UNKNOWN OFFICER: You're a citizen. You can walk up there right now.

MR. OVADAL: No. Can I hold a sign on that bridge, that one right there, that overpass, ever?

SERGEANT PAULSON: What I'm saying is you have the right to demonstrate. Clearly you have the right to demonstrate, and you have the right to free speech.

MR. OVADAL: But this is a specific question.

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SERGEANT PAULSON: What I'm saying is the venue here, no, is not suitable for demonstration.

MR. OVADAL: I can never hold a sign on that bridge ever, 24 hours a day? If I come back here at 2 in the morning, I can't hold a sign?

MR. FOHT: Sergeant, you understand why I was just asking for a superior because --

SERGEANT PAULSON: Absolutely.

MR. FOHT: -- I've been here five times --

MR. OVADAL: (Inaudible)

MR. FOHT: -- and I've dealt with sergeants, other sergeants who have said it's fine to be here. So you know, you have two sergeants saying one thing. That's why I'm asking, you know, if we could talk to a lieutenant or talk to a captain.

SERGEANT PAULSON: There is no lieutenant --

MR. FOHT: None?

SERGEANT PAULSON: -- or captain for me to talk to. Again, I'm the southwest supervisor at this particular point, and again, I appreciate that you guys --

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MR. OVADAL: It's a moot point. It's a moot pint.

SERGEANT PAULSON: You know, you have to understand the position I'm in, and the position I'm in is I have to make decisions. Okay. And again, at this particular point I've made my decision. It's not going to change. Okay.

MR. OVADAL: But did they tell you that the traffic was crawling at five miles an 10 hour?

SERGEANT PAULSON: Well, rush hour traffic, you bet. And again, we do have a caller --

MR. OVADAL: You're saying it was 65 miles an hour. Well, it was crawling at five. So you're saying under no condition ever could we be on that bridge, no matter how slow it was, no matter what time of day --

SERGEANT PAULSON: You have the right to walk on that bridge.

MR. OVADAL: No, no, no. I mean, to demonstrate with signs.

SERGEANT PAULSON: One of my things is, and I know that you're -- it appears that you have a very good grasp of the law and I appreciate

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that. Okay.

MR. OVADAL: I'm just trying to --

SERGEANT PAULSON: I hear you.

MR. OVADAL: I like the police officers.

SERGEANT PAULSON: You bet. Absolutely.

MR. OVADAL: I respect them. I don't want to go to federal court, but I want to be able to --

SERGEANT PAULSON: Well, again, not on this bridge, not with the location of this bridge. You know, can a demonstration be facilitated in a manner where I'm not worrying that someone is going to slam on their brakes because they're upset and now we're going to have an accident and now I'm out on the accident. I have to make a tough decision here.

The reality is do I support free speech, absolutely. Does the Madison Police Department support free speech, I think we have a history of doing that.

MR. OVADAL: Up until now.

SERGEANT PAULSON: The reality is that on this particular bridge, an overpass on a

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Beltline where the traffic is -- can be intense, this is my decision. The answer is no.

MR. OVADAL: None of these overpasses in your sector --

SERGEANT PAULSON: Not in the City of Madison.

MR. OVADAL: Do you have other ones like that?

SERGEANT PAULSON: My sector right now, I'm the south and west.

MR. OVADAL: Do you have other ones like that, I mean, in yours?

SERGEANT PAULSON: Probably.

MR. OVADAL: Because I know there are more. So none of these?

SERGEANT PAULSON: No. No, you're not going to be up on the highway. Okay.

MR. OVADAL: Well, we left under threat of arrest. I mean that was --

SERGEANT PAULSON: Absolutely. Absolutely. Just so we're clear on videotape, that's my decision. Okay.

MR. OVADAL: I know that. We were told that we could be cited if we wouldn't leave --

SERGEANT PAULSON: Arrested for

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disorderly conduct, yes, sir.

MR. OVADAL: And if we didn't pay fines or whatever, we could go to jail. So we left under threat of possible jail.

SERGEANT PAULSON: Okay. Absolutely, yes. I think that's accurate and that's clear. Okay.

MR. OVADAL: That's why I appreciate your --

SERGEANT PAULSON: I mean --

MR. OVADAL: -- (inaudible) for safety but I believe you're wrong.

SERGEANT PAULSON: Okay. I hear you.

MR. OVADAL: And I will be back on that bridge.

SERGEANT PAULSON: Okay.

MR. OVADAL: Okay. I appreciate it.

SERGEANT PAULSON: All right.

MR. OVADAL: I really do.

SERGEANT PAULSON: Okay. Youv'e got to understand I have to make the decisions. Okay.

MR. OVADAL: I'm just trying to avoid -- there are people out there (inaudible). See, if I really wanted to make some money, I would

[55]

have just sat there and let you take the signs and arrest us and haul us to jail, then we could have made some really nice money. I'm not into that. I just want to exercise my First Amendment rights. Do you see what I'm saying?

SERGEANT PAULSON: Um-hum.

MR. OVADAL: So when he says leave under threat of arrest, well, obviously we can't exercise our First

Amendment rights, we're under threat of arrest. We don't want to go to jail.

SERGEANT PAULSON: Sir, there are plenty of places to exercise your First Amendment rights.

MR. FOHT: But couldn't we have an accident in any of those? Couldn't we have an accident if I set a sign up here?

SERGEANT PAULSON: I think it's venue based, yeah, you're correct. I think it's venue based.

MR. FOHT: So we couldn't take it anywhere in Madison?

MR. OVADAL: We can --

SERGEANT PAULSON: That's --

MR. OVADAL: I mean, we can hash this over (inaudible).

[56]

SERGEANT PAULSON: We can. We can. And it's not productive.

MR. OVADAL: (Inaudible). He ain't changing.

SERGEANT PAULSON: Absolutely. Okay.

MR. OVADAL: I'm not changing.

SERGEANT PAULSON: I hear you. You know who I am. Okay. All right.

MR. OVADAL: All right. I'll go back to (inaudible).

SERGEANT PAULSON: Good luck to you.

OFFICER FIELDS: Have a good night, Mr. Ovadal.

SERGEANT PAULSON: Okay.

[57]

STATE OF WISCONSIN)
COUNTY OF DANE)

I, LINDA KUHLMAN, a Notary Public in and for the State of Wisconsin, do hereby certify that as a duly-appointed reporter, I transcribed in shorthand the videotape recorded September 2, 2003, and that the attached is a transcription to the best of my ability of the recording.

Dated October 25, 2005 at Madison, Wisconsin.

_____

Notary Public, State of Wisconsin

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RALPH OVADAL,

Plaintiff,

vs. Case No. 04-C-322-S

CITY OF MADISON, WISCONSIN;
RICHARD WILLIAMS, in his
official capacity as Chief
of Police for the City of
Madison, Wisconsin;
CHRIS PAULSON, individually
and in his official capacity
as Sergeant for the City of
Madison Police Department, and
PATRICK GRADY, individually
and as Police Officer for
the City of Madison Police
Department,

Defendants.

TRANSCRIPT OF PROCEEDINGS
FROM VIDEOTAPE

Date: October 11, 2003
Transcribed by: LINDA KUHLMAN

[2]

SERGEANT GRADY: The city.

MR. OVADAL: This is town, right?

SERGEANT GRADY: No, the city. We have responsibility for the --

MR. OVADAL: See, we have already been through the federal court on this, this very walkway. The Town of

Madison police chief could tell you. I don't know if he's on duty but --

(Break in taping)

MR. OVADAL: -- federal courts settled out of court. We have the constitutional right to be up on this very walkway. So this was -- when was that, Mike?

MR. FOHT: I was one of the guys that was arrested last time.

SERGEANT GRADY: Where are you people from?

MR. OVADAL: (Inaudible) I mean, I'm from Monroe.

SERGEANT GRADY: So you're a Monroe group. Okay. You've always been cooperative with us.

MR. OVADAL: Yeah, we want to be.

SERGEANT GRADY: And I guess my feeling is that you present a traffic hazard there.

[3]

You've got people going 60, 70 miles an hour down there and they're looking up there and seeing you.

MR. OVADAL: Well, we like to be up right there rather than alongside. It's almost better because they just look -- and you know, with all the billboards and all this kind of same thing but that's all like (inaudible). The reason we went here is the City of Madison is saying we don't want you over here, and we're kind of waiting -- I asked the DA, the city attorney if he could review that rather (inaudible), and so you know, we don't want to get into a federal court case over there if we don't have to.

SERGEANT GRADY: Okay.

MR. OVADAL: I'm not looking for trouble.

SERGEANT GRADY: Okay.

MR. OVADAL: So we pulled back here because this one has already been through the federal court, the whole system, you know.

SERGEANT GRADY: Okay. The problem is is that the jurisdiction for the Beltline switched in the last -- the Town of Madison is being phased out. We have --

[4]

MR. OVADAL: Oh, no kidding.

SERGEANT GRADY: -- the whole Beltline all the way up and down here.

MR. OVADAL: Oh. So this is under your jurisdiction now?

SERGEANT GRADY: Yeah, that's the way I understand it. I had to move (inaudible) but that's our take on it. You know, I guess when you were over on Greenway Cross (inaudible) on the side of the road we didn't really have a problem with that as much as we have with this. MR. OVADAL: Well, yeah, I know, but we talked to the shift sergeant, the day shift sergeant over (inaudible) nothing happened.

SERGEANT GRADY: (Inaudible).

MR. OVADAL: Well, no, we actually talked to sergeant -- tall guy, big, tall guy.

MR. FOHT: The second shift, yeah.

SERGEANT GRADY: Oh, second shift. Oh, Paulson. Okay.

MR. OVADAL: Yeah. And we went through the whole thing, and he said no, you've got to leave, and basically it was like you have to leave or you'll be arrested. So I mean, rather than -- obviously we're not going to be arrested so

[5]

we left.

So now you're saying this is the same situation.

SERGEANT GRADY: Well, see, what happens is the town is being phased out, and they have over here, but as I understand it we have all the way -- the Beltline and, you know, related properties, which is this.

MR. OVADAL: Okay. But tell us what -- this is under your jurisdiction?

SERGEANT GRADY: That's what I understand.

MR. OVADAL: So tell us what the situation is. You're saying we have to leave?

SERGEANT GRADY: Yeah.

MR. OVADAL: It's the same situation, we'd be --

SERGEANT GRADY: Same --

MR. OVADAL: -- cited --

SERGEANT GRADY: Cited.

MR. OVADAL: -- if we don't leave.

SERGEANT GRADY: Yep. You know, and I understand, you know, and I support your right to protest. You know, that's fine. And Greenway Cross was okay. I mean, we didn't have a problem

[6]

with that, but with the overpass we do have a problem.

MR. OVADAL: Well, we've already -- I don't see much sense in going through a bunch of rigmarole. I've already talked to the other sergeant. We're waiting for a decision from the city attorney.

SERGEANT GRADY: Okay.

MR. FOHT: Not city, district attorney, I think.

MR. OVADAL: City attorney.

MR. FOHT: Oh, city attorney.

SERGEANT GRADY: City attorney.

MR. OVADAL: We've let them know that we really is First Amendment protected, you know, all that stuff --

SERGEANT GRADY: Yeah, yeah.

MR. OVADAL: -- activity and we left the other place because we were told we'd be arrested if we didn't leave, and I guess that's what you're telling us here, correct?

SERGEANT GRADY: Yes. You know, I -- you know, I support your right to do this.

MR. OVADAL: No, I'm not -- it's

[7]

nothing personal.

SERGEANT GRADY: Nothing personal. That's one of the rights that people have, but we have to be candid with everybody. I mean, you know, you're not the only people who try to get on the overpass. I mean, we have all kinds. We have gay rights groups and women's rights groups and --

MR. OVADAL: Yeah, this is one of those things that will have to be worked through.

SERGEANT GRADY: Yeah, the city attorney --

MR. OVADAL: We're not trying to make enemies out of cops on the beat.

SERGEANT GRADY: Right. We're not trying to harass you either. We're just trying to do our job.

MR. OVADAL: But we already went through, you know -- I'm not going to -- you know, you guys got a lot to do and you know --

SERGEANT GRADY: Especially today.

MR. OVADAL: What is today anyway, the police --

MR. OVADAL: Football game.

SERGEANT GRADY: -- the Wisconsin

[8]

game at 8 o'clock tonight.

MR. OVADAL: So my understanding is that this is under the City of Madison jurisdiction and we need to leave or we will be cited.

SERGEANT GRADY: Yeah.

MR. OVADAL: If necessary I imagine you would just remove our signs and arrest us?

SERGEANT GRADY: Right.

MR. OVADAL: Okay. So we don't have much choice. Are you coming to join us or what?

UNKNOWN SPEAKER: Oh, no, I'm totally against you guys.

MR. OVADAL: I can see that on your face. Can I have a card then in case I have some questions?

SERGEANT GRADY: Sure.

MR. OVADAL: All right. Well, we don't have much choice.

SERGEANT GRADY: Our station is right through the back of (inaudible). And our captain is generally there Monday through Friday, like from 8 to 5 (inaudible), so if you need to get ahold of anyone (inaudible) and try to cooperate and find a place that's reasonable for you (inaudible).

[9]

1 MR. OVADAL: This was --

SERGEANT GRADY: We'll try to cooperate as best we can.

MR. OVADAL: Right.

SERGEANT GRADY: We do that with all the (inaudible) people.

MR. OVADAL: Yeah. We have a disagreement on this obviously because it's been worked out through the courts, but the bottom line is, you know, we are not going to, you know, get arrested and have our signs taken and do that. You know, we're not going to do that. We'll just --

SERGEANT GRADY: I appreciate you not doing that.

MR. OVADAL: We'll work through the courts. We've already been through all this.

MR. FOHT: Did you say that that part is the Town of Madison over there, the trailer --

SERGEANT GRADY: Across the street is, yes.

MR. FOHT: The last time the chief came out here he said this was still part of it, but that's changed since last year?

SERGEANT GRADY: Well, about four or

[10]

five months ago it was.

MR. FOHT: Okay.

SERGEANT GRADY: But we've got the whole Beltline now, all the way up --

MR. OVADAL: He's saying they're phasing out --

SERGEANT GRADY: The only place we don't have is up by the arboretum. The Town of Madison still deals with that. It's University property but Town of Madison deals like, I think, with from Todd Drive up to Seminole Highway. That low bridge is -- that's still Town of Madison.

MR. FOHT: Okay.

MR. OVADAL: So this is now City of Madison jurisdiction?

SERGEANT GRADY: City of Madison jurisdiction.

MR. OVADAL: Same thing applies what happened up there.

SERGEANT GRADY: Right.

MR. OVADAL: We leave or you're going to lose your signs, you're going to be cited --

SERGEANT GRADY: Right, right.

MR. OVADAL: (Inaudible) be

[11]

arrested.

SERGEANT GRADY: I guess what I would say is, you know, before you do this next time stop over and see our captain or lieutenant over there and try to get something ironed out --

MR. OVADAL: Yeah, we're trying --

SERGEANT GRADY: -- that sounds acceptable to both. I mean, we cooperate --

MR. OVADAL: That's why we stopped here. We assumed it was still in the Town of Madison (Inaudible). And we are in the process of -- you know, I contacted two of your captains. At first I called in and they said well, contact Captain (inaudible) -- or something.

SERGEANT GRADY: (Inaudible).

MR. OVADAL: So I e-mailed them and then they said we're going to forward it to the city attorney (inaudible).

SERGEANT GRADY: Yeah.

MR. OVADAL: So I (inaudible). And I wrote just last week to the city attorney, you know, we're still waiting because that's a, you know, reasonable (inaudible) --

SERGEANT GRADY: Yeah.

MR. OVADAL: And he still hasn't

contacted me. [12]

SERGEANT GRADY: Right.

MR. OVADAL: Eventually if we don't hear any more, then we'll just have to go ahead --

SERGEANT GRADY: Well, why don't you talk to him, you know, and see if you can't work this out, and you know, I mean, if the city attorney comes down and says, you know, that's fine, then, you know, that's fine with us, too. We're trying just to do what we're supposed to do.

MR. OVADAL: Yeah, I can see that. Our contention is always that you've got billboards all over. You've got -- you know, this is distracting over here -- drivers are required to have their vehicle under control.

The last place we set up there was a huge Hooters billboard right beside us and, okay, you're telling me that's not a little distracting. (Inaudible) and sex, you know.

SERGEANT GRADY: Yeah.

MR. OVADAL: But that's the whole thing as far as that goes (inaudible). Okay. All right. Well, we don't have any choice in the matter.

SERGEANT GRADY: Well, thank you. I

appreciate the cooperation. Take care. Which group are you (inaudible) to? [13]

MR. OVADAL: I don't have a card. It's Ralph Ovadal. Do you have a piece of literature or anything with my number?

MR. FOHT: Yeah, we can get one here.

MR. OVADAL: Yeah. Would you run quick. (Inaudible)

MR. OVADAL: (Inaudible) Here's me here, here's you there.

SERGEANT GRADY: Right. You guys aren't out doing criminal stuff.

MR. OVADAL: Yeah.

SERGEANT GRADY: I understand that.

MR. OVADAL: Because I don't want to be (inaudible). That's why we came back here. (Inaudible)

SERGEANT GRADY: (Inaudible) south side and find a place that's reasonable and do all that.

MR. OVADAL: (Inaudible).

SERGEANT GRADY: Okay. Real good. Take care.

[14]

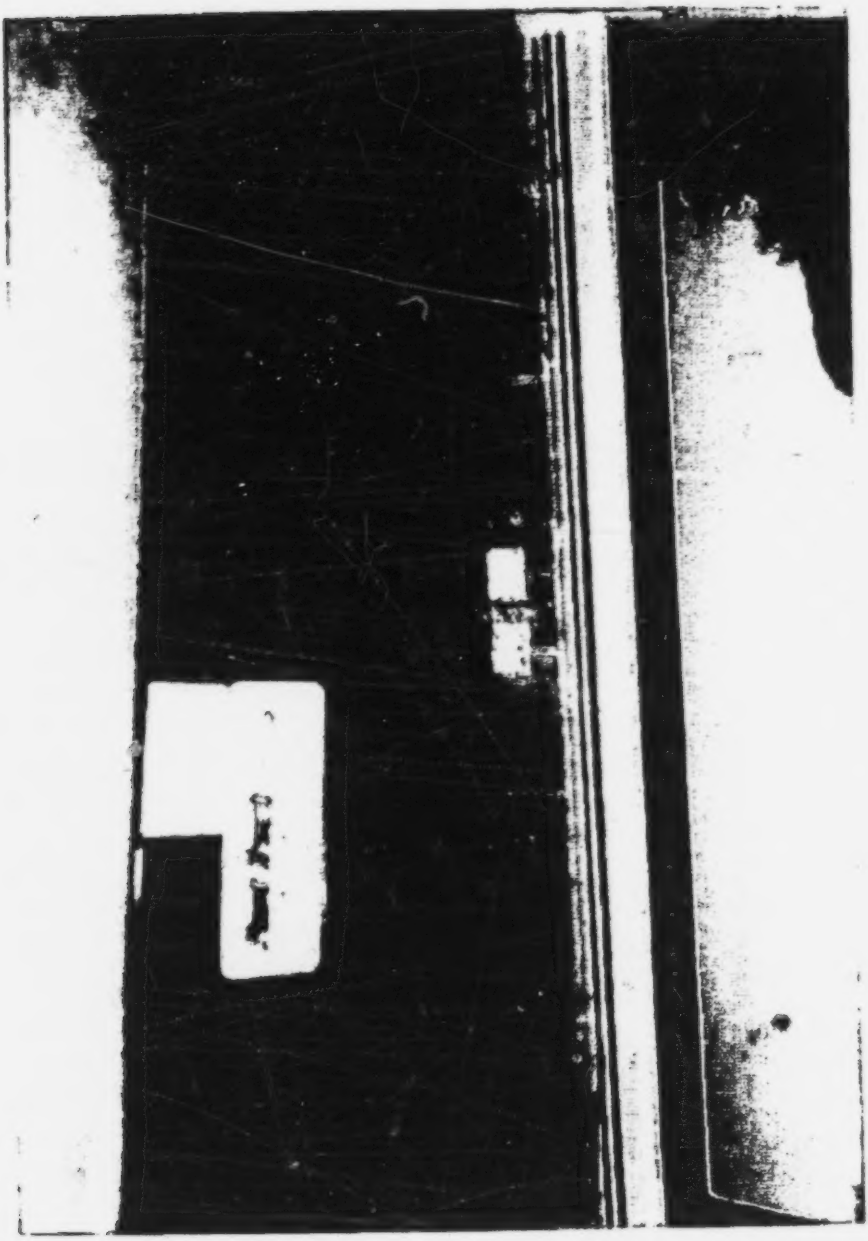
STATE OF WISCONSIN)
COUNTY OF DANE)

I, LINDA KUHLMAN, a Notary Public in and for the State of Wisconsin, do hereby certify that as a duly-appointed reporter, I transcribed in shorthand the videotape recorded October 11, 2003, and that the attached is a transcription to the best of my ability of the recordings.

Dated October 25, 2005 at Madison, Wisconsin.

_____
Notary Public, State of Wisconsin

APPENDIX J



APPENDIX K

MADISON POLICE DEPARTMENT

Date of Report: 9/3/2003 Case No: 2003-106076
Original

Ref. No:
Occurred Incident: 97 - Information Sec/Area: 104 WEST
Dispatched as: 97 - Information Grid:

Case Offense: DISORDERLY CONDUCT
Addr of Occurrence: 4500 W. Beltline HWY (Pedestrian Overpass)
Call Date/Time: 09/02/2003 17:06 From Date/Time:
Dispatch Date/Time: 09/02/2003 17:11 Thru Date/Time:
Reporting Officer: PO CURTIS E FIELDS 2538
Special Routing: LT. WAHL/LT. PETERSON/SGT.PAULSON

CONTACT RALPH N: OVADAL
M/W DOB: 08/05/51 (52 yrs) Height: 6.00 Weight: 200
HairColor: BRO HairLength: BALDING ON TOP EyeColor: BRO Glasses: GLASSES
W6908 HWY 81, MONROE, WI H: 328-4841 W: 527-2134
EMPLOYER: REVEREND FOR CHRIST KING CHURCH, PO BOX 7771, MONROE, WI
OVADAL IS ALSO A MEMBER OF THE WISCONSIN CHRISTIANS UNITED.

CONTACT MICHAEL J. FOHT
M/W DOB: 04/13/67 (36 yrs) Height: 5.11
Weight: 143
N2097 STEINER RD., MONROE, WI H: 328-4841

POSSIBLE CHARGES ON BOTH OF THE ABOVE GENTLEMEN IS DISORDERLY CONDUCT, S.S. 947.01

OFFICER INFO: I WAS IN CIVILIAN CLOTHES AT THE TIME OF THIS CONTACT WITH MY PORTABLE RADIO AND OPERATING MY OWN PERSONAL VEHICLE.

OFFICER NARRATIVE

On 09/02/03, at approximately 4:37 p.m., I was proceeding westbound on the Beltline Hwy when I noted a distinctive slow up in traffic that was evident just east of Seminole Hwy moving towards Verona Rd. Several times in traffic I had to press on my brakes and at one point I had to completely stop my vehicle as no traffic was moving at that time. Believing that there possible was a crash forward of my position, I began looking around. It was at that time that I noted on the pedestrian over pass, approximately 10 to 15 people standing, facing both sides of eastbound and westbound sides of the Beltline, with signs stating, "Homosexuality is Sin." Other people standing in the pedestrian walkway were also holding smaller banners and shouting down to vehicles.

After informing dispatch of what I had seen in reference to the protest on the pedestrian walkway, located at 4400 W. Beltline Hwy, I was then told by dispatch at that time that they had received several people calling in who were very upset in reference to the protest taking place on the

walkway. I then informed dispatch that I would be turning my vehicle around at Whitney Way and returning back to the protest site.

While en route, dispatch called backup for me and officers Dana Cummins and Pedro Ortega-Mendoza arrived on the scene. PO Cummings remained mobile in the area while PO Ortega-Mendoza and I proceeded on foot up to the walkway. As PO Ortega-Mendoza and I proceeded up, I first made

Case # 106076, PO CURTIS E FIELDS 2538 Page 2 of 4

contact with an older gentleman who described himself to me verbally as Ralph N. Ovadal and stated to me at that time that he did not carry any ID on his person. Ovadal stated he was a pastor currently representing the Wisconsin Christians United and that he had a church in Monroe, Wisconsin.

In speaking with Ovadal on the overpass, we were immediately joined by Michael Foht, who was verbally identified to me later. Foht was carrying a Sony camcorder. A third person also began snapping still pictures of myself and PO Ortega-Mendoza as we were speaking with Ovadal. Ovadal stated to me he had ever right to protest on the pedestrian walkway and that they had recently gone to federal court with the Town of Madison and that the Supreme Court ruled against the Town of Madison and that it "cost them quite a bit of money to pay them."

I informed Ovadal that we had received several complaints from passing motorists that his actions were causing traffic slow-ups at that time. Ovadal stated that was not his concern as various bulletin boards in the area would cause

more of a driver's distraction that his people on the pedestrian walkway.

I informed Ovadal his actions may cause a multi-car pile up on the Beltline and put people at risk, and that his location of protest may not be the best. It should also be noted that I informed Ovadal at that time that I was not there to Impede his First Amendment right to gather and protest his issue, I was merely there for the sake of insuring the public safety. Ovadal stated to me words to the effect of, "The public safety does not override my right to protest." I informed Ovadal that I disagreed and that should it be determined that his actions were causing a possible hazard to passing motorists, he would be ordered to disband and leave the area.

I next made contact with Sgt. Paulson by portable radio, channel 5. I was informed by Sgt. Paulson at that time that as long as no serious complaints were coming into the dispatch center, and that the protesters had an open area by which other people coming onto the walkway were able to pass, they were free to stay where they were and no further action would be taken. I informed Ovadal of this fact, to which Ovadal thanked me for checking the issue and stating, "You know that in federal lawsuits, every individual offer officers brought into it." Ovadal appeared to be grateful that was not an issue at this time. Ovadal further stated to me, prior to me leaving, that he and his fellow persons were planning to leave in about 10-15 minutes.

It should be noted that during that time I had requested of Ovadal at least three times asking his, not telling him, if he and his followers could please exit the pedestrian walkway. Ovadal stated they would not leave unless they

were ordered under threat of arrest to leave the bridge area.

It should be noted that Foht was always present with the camcorder was always present with the camcorder when I was speaking with Ovadal and never left his side the entire time and often tried to engage in further debate as to why it was their constitutional right to stay on the bridge and protest their anti-gay stance.

I then exited the area at approx. 4:51 p.m.

I was re-contacted by Sgt. Paulson at approximately 5:06 p.m. and informed Sgt. Paulson at that time that they were reporting a major slow-up on the Beltline and that approximately a dozen people or more had called in stating that they had to slam on their brakes for fear of colliding with the vehicle in front of them. Sgt. Paulson then instructed me, along with PO Kevin Dunnington and PO Dana Cummings, to return back to the pedestrian overpass to 4400 W. Beltline HWY and request Ovadal and his followers that they then leave the bridge due to the hazard to the public safety.

Case # 106076, PO CURTIS E FIELDS 2538 Page 3 of 4

I returned to the pedestrian overpass and again contacted Ovadal with Foht present videotaping the entire exchange. I informed Ovadal that we had received several calls and that several people had stated they nearly got into crashes on the Beltline while people were looking up at his followers and their signs. Ovadal's response to me was, "That is an out-and-out lie. We've been standing out here the whole time and have not seen anyone crash or even appear to nearly crash into each other." Ovadal then asked me if I personally had seen any instances where people

were crashing or had nearly crashed. I told Ovadal that I was not present on the Beltline to witness any such instances.

However, it should be noted that during my time standing with Ovadal. I saw several people sticking their middle fingers up at Ovadal and his protesters. I saw one woman, while driving, actually come up through her sunroof and scream obscenities at Ovadal and his parishoners. I was also present while Ovadal's perishioners would yell down to trucks as they honked their horns. Some people were acting irresponsibly and driving in a careless manner due to their outrage at Ovadal's signs.

I re-contacted Sgt. Paulson who then contacted on-duty District Attorney Judy Schwamle. I was the re-contacts by Sgt. Paulson a short time later and informed that even though Ovadal and his parishioners had the right to assemble and protest, they did not have carte blanche to protest on the pedestrian walkway and causing a possible hazard to rush hour motorists. I was instructed by Sgt. Paulson at that time to request of Ovadal and his people that they leave. I was informed by Ovadal and Foht that in order for me to get them to leave, I would have to order them under threat of arrest to leave the pedestrian walkway. I informed Ovadal at that time that I was ordering him off of the pedestrian walkway, or he and his parishioners would be cited for disorderly conduct. Ovadal then made sure I was on tape and was very clear in my statement. Ovadal then repeated to me, "Let me get this straight, you are ordering us off this bridge by threat of arrest. Is that correct?" I informed Ovadal that was correct per Sgt. Paulson's instructions.

Ovadal's followers then rolled up their signs and proceeded down to the south side of the pedestrian

walkway to their vehicles, which were then parked on Britta Parkway, adjacent to the walkway. Sgt. Paulson arrived a short time later. PO Dunnington, PO Cummings and I were present when Ovadal spoke with Sgt. Paulson. Sgt. Paulson made it clear to Ovadal that based on the possible risk of endangering the public safety by the parishioners being on the bridge with their signs and distracting passing motorists, it was his decision to have his parishioners leave the bridge area at that time and he did not want them to return. Sgt. Paulson made this statement no less than three times in my presence that it was his decision to have Ovadal and his people ordered off of the pedestrian walkway area and that they could not return to the walkway area if their intent was to re-establish their signs and continue their protest activity while rush hour was occurring. Ovadal asked Sgt. Paulson if at any time they could return to the pedestrian walkway area. Sgt. Paulson replied they could not return to the pedestrian walkway at all if it was going to be a public safety hazard.

I was contacted by Sgt. Paulson a short time after leaving the scene. At approximately 6"10 p.m., Sgt. Paulson informed me to stay in the area but out of sight. It was at this time that Sgt. Paulson stated Ovadal alone walked up onto the pedestrian walkway with an American Flag, walked back and forth, returned to where his parishioners were waiting for him and then left the area.

It should be noted that during my contact with Reverend Ovadal, he was courteous, but continued to request of me specific wording as to why he and his parishioners could not be on the pedestrian walkway. Ovadal continued to insist that because anonymous complainants were calling in, that was not good enough to remove him and his followers from the bridge, even though I continued to state

that we were getting reports that people were nearly crashing into one another on the Beltline due to the fact that other motorists were watching his protest. Ovadal continued to insist that billboards were a bigger distraction than his followers and that it was not his responsibility at all. When I confronted

Case # 106076, PO CURTIS E FIELDS 2538 Page 4 of 4

Ovadal with the fact that his right to assemble did not outweigh that of the safety of the general public, Ovadal disagreed with me, stating that his right to assemble essentially outweighed public safety.

A tape was requested by Sgt. Paulson for me, but was not present at the time of this report. One I receive the dispatch tape, I will provide a detailed report reference the call itself along with the number of calls for service that were generated at the time of this incident.

NFA.

Supervisory Officer: _____ I.D.: _____

Reporting Officer: _____ I.D.: 2538
PO CURTIS E FIELDS

jmn:dictated 09-02-03

[PAGE 5]

5/25/04 Incident Maintenance Inquiry
ORI #: WI01301 MAPD 2003-00106076

Call Date/Time : 09/02/2003 17:06:39
Dispatch Date/Time : 09/02/2003 17:11:51
Arrive Date/Time : 09/02/2003 17:15:59

Clear Date/Time . : 09/02/2003 23:45:34 Disposition: REPORT

Location . . : 4400 W. BELTLINE HY Type: O
Cross Street : Venue: MA MADISON
Nature Of Call: CALLER SAYS SHE ALMOST HAD A 10-50 BECAUSE OF THE PROTESTERS
Caller . . . . : , , ,
Complainant . : , , ,
Incident Type : 97 P INFORMATN Phone Number:
Report Reqd . : YES Priority . : 8
Unit 1 # . . : A40 ID # 1: FIELDS,CURTIS,E, ID # 2 : TEMPLETON,SCOTT,A
Unit 2 # . . : 2A3 ID # 3: OLSON,SARAH,E, ID # 4: DUNNINGTON,KEVIN,
Area: 100 WEST Section: 104 104 Grid :

F3=Exit F7=Prior F8=Next F9=Cases
F11=State/NCIC History F12=Cancel
F14=Status/Dispos F15=Suspect Vehicles
F16=Names F17=Times F18=Radio Log
F19=Dispatch F20=Plates F21=Review Process
F23=Case Documents F24=Documents

[PAGE 6]
New World Systems Corporation AU2300S1
5/25/04 Work With Documents
Year: 2003 Incident: 00106063
T Free Form Document AU2346S1
More + -

CALLER SAYS SHE ALMOST HAD A 10-50 BECAUSE OF THE PROTESTERS.
ANOTHER CALLER DISTURBED BY THE SIGNS 1719,002
ANOTHER COMPLAINT-PAULA PACHCIARG?NOT SURE ON THE SPELLING
O CELL:206-1770 HM:273-4806 1743,007

REF CASE #03-106063 1816,004

5

F F3=Exit F12=Cancel [PAGE 7]

5/25/04 Work With Documents
Year: 2003 Incident: 00106076
T Free Form Document AU2346S1
More + -

	UNIT	DISPATCH DATE TIME	DISP ARRV TIME	ARRV CLEAR TIME	CLEAR TIME	LEAVE DATE TIME	BADG	SHF
	2A3	09/02/03	17:11	00:00	00:00	00:00 09/02/03	17:13	2959
O	2C5	09/02/03	17:11	00:00	00:00	00:00 09/02/03	17:15	2942
5	A40	09/02/03	17:11	17:15	00:00	00:00 09/02/03	23:45	2538
_	2A1	09/02/03	17:13	17:20	00:00	00:00 09/02/03	18:15	3118
	2A8	09/02/03	17:15	17:17	00:00	00:00 09/02/03	18:12	2948
	1226	09/02/03	17:36	18:23	00:00	00:00 09/02/03	18:29	2322
	2A7	09/02/03	17:42	17:56	00:00	00:00 09/02/03	17:58	2950

F F3=Exit F12=Cancel [PAGE 8]

Madison Police Department PL1020DZ
5/25/04 Incident Maintenance Inquiry
ORI #: WI01301 MAPD 2003-00106063

Call Date/Time . : 09/02/2003 16:37:39
Dispatch Date/Time : 09/02/2003 16:37:39

Arrive Date/Time : 09/02/2003 17:15:59
Clear Date Time . : 09/02/03 16:51:51
Disposition: REPORT

Location . . : EB HY 12 HY Type: O
Cross Street : SEMINOLE HY Venue: MA
MADISON
Nature Of Call: PROTESTERS ON OVER PASS CAUSING TRAFFIC PROBLEMS 163
Caller . . . : A40, , ,
Complainant . : , , ,
Incident Type : 85 P SAFTY HZRD Phone Number:
Report Reqd . : YES Priority . : 5
Unit 1 # . . : A40 ID # 1: FIELDS,CURTIS,E, ID # 2 : EHLY,ADRIA,B,
Unit 2 # . . : 2A6 ID # 3: ORTEGA-MENDOZA,PE ID # 4:
Area: 100 WEST Section: 104 104 Grid :

F3=Exit F7=Prior F8=Next F9=Cases
F11=State/NCIC History F12=Cancel
F14=Status/Dispos F15=Suspect Vehicles
F16=Names F17=Times F18=Radio Log
F19=Dispatch F20=Plates F21=Review Process
F23=Case Documents F24=Documents

[PAGE 9]
New World Systems Corporation AU2300S1
5/25/04 Work With Documents
Year: 2003 Incident: 00106063
T Free Form Document AU2346S1
More + -
PROTESTERS ON OVER PASS CAUSING TRAFFIC PROBLEMS 1637,004

O

5

F F3=Exit F12=Cancel

APPENDIX L

MADISON POLICE DEPARTMENT

Date of Report: 11/24/2003 Case No: 2003-123862
Original

Ref. No: 2003-106076
Occurred Incident: 65 – Check Person Sec/Area: 309 SOUTH
Dispatched as: 65 – Check Person Grid:

Case Offense: DISTURBANCE/PROTEST
Addr of Occurrence: 300 W. Beltline Hy
Call Date/Time: 10/11/2003 08:29 From Date/Time:
Dispatch Date/Time: 10/11/2003 08:30 Thru Date/Time:
Reporting Officer: SGT PATRICK J GRADY 0670
Special Routing: LT. VIC WAHL

CONTACT RALPH N. OVADAL
M/W DOB: 08/05/51 (52 yrs) Height: 6.00 Weight: 200
HairColor: GRY EyeColor: BRO
W6908 HWY 81, MONROE, WI H: 328-4841 W: 527-2134
HOW ID'D: VERBALLY

OFFICER INFO: I WAS OPERATING VEHICLE #225 ACTING AS SOUTH SUPERVISOR, DRESSED IN FULL POLICE UNIFORM.

OFFICER NARRATIVE

On October 7, 2003, I was eastbound on the W. Beltline Hyw approaching Park Street when I noted vehicles slowing up s they approached the overpass running from Nedrobo's to the trailer park area on W. Badger Rd. in the approximate 300-blk of W. Beltine Hwy. As I approached the overpass, I noticed there were numerous people with banners, approximately 12-15 people, waving at passing vehicles and also waving banners that condemned homosexuality. I stopped my vehicle just prior to the overpass on the far right-hand side of the roadway and told the people they had to leave as in my opinion they were creating a disturbance and distracting drivers who were operating their vehicles in the eastbound lane of the Beltline with speeds approaching 55 to 65 mph. It should be noted that on that day the traffic was moderate and vehicles were definitely slowing down as they approached the overpass. In my opinion, this created a hazard to the drivers in the eastbound lane of the Beltline, as well as the westbound lane, as the protesters were above both sides of the highway with their banners and waving at drivers.

It was difficult for them to hear me as it was difficult for me to hear them. However, it appeared they had no intention of leaving the overpass and it was necessary for me to respond down to Rimrock Rd., up Rusk to W. Badger and park opposite the trailer park on W. Badger Rd., adjacent to the overpass. At this time, PO Brad Armstrong responded to my location, as did PO Jim Morovic.

I immediately made contact with a gray-haired man who identified himself as Ralph Ovadal. Ovadal advised me he was a minister and that he was representing Wisconsin's Christians United and that he and his followers were in the process of protesting/condemning homosexuality. He gave me several pieces of literature espousing his cause and

advised that he had been told by the Chief of the Town of Madison that he could protest here at any time as the Chief did not believe he was violating any policies.

Case # 123862, SGT PATRICK J GRADY 0670 Page 2 of 2

At this time, I informed Reverend Ovadal that this overpass and part of the Beltline was no longer the town of Madison but had been annexed several months prior. I further informed him that this was all part of the annexation of the town of Madison between Fitchburg and the city of Madison, which had been agreed upon approximately six months earlier. I informed him that based on that, the permission he received from the Town of Madison was no longer valid and that I as a police officer for the City of Madison believed his protest was distracting motorists as they drove by in the east and westbound lanes of the W. Beltline Hwy. Ovadal informed me he did not believe it reasonable for him to leave and stated that his followers, three of which had video cameras and were videotaping us at this time, had no intention of leaving. I informed him at this time that if he did not leave, it would be necessary for me to arrest he and his followers for disorderly conduct and remove them from the bridge area, if that was necessary. I told him that I hoped he would cooperate, as I have been involved with past protests where his group has been involved, particularly at the corners of Fish Hatchery Rd. and Greenway Cross where they were very cooperative and were able to demonstrate and in our opinion cause no distraction at that time to motorists. However, I reiterated that because of his signs, placards and people waving, I believed it created a hazard for drivers on the Beltline. I informed him many of these people were going in excess of 55 mph and that it created a hazard that I did not think

was acceptable at this time and I believed it was my job as a police officer to remove distractions and make sure the drivers were able to operate their vehicles safely without such distractions.

Reverend Ovadal was very cooperative and that if the chose was either to stop or be arrested, he would stop and he would remove his followers but he would definitely protest this to higher authorities. At this time, I gave him my card, I explained that we certainly were not against him protesting, or in any way violating his First Amendment Rights; however, it was my belief that the hazard far outweighed his right to protest and that because of that, I was asking him in a reasonable and cooperative manner to leave the bridge area and find a place that was safer for both he and the drivers in the immediate vicinity so he could protest in a more reasonable manner. Ovadal stated to me he would leave but that he objected to the fact that I was violating his First Amendment Rights and that he believed he was within those rights to protest on the overpass. In addition, he stated to me he had done this before and that he had also been ordered to leave the overpass area, which he believed to be just beyond Seminole Hwy prior to this. Ovadal, during my contact with him, was very cooperative and reasonable. No other individuals in the immediate group intervened or in any way attempted to protest my actions.

Following my contact with Rev. Ovadal, he and his followers left the bridge area and did not return.

I would also like to add that prior to my leaving Rev. Ovadal, I did provide him with the telephone number of Captain Gaber and recommended that he contact Capt. Gaber in order to facilitate any future protests. He did not agree to do this, nor did he say he would contact him, but I

gave him the option to do so if he so desired so in the future. My contact with the Reverend took place at approximately 8:29 a.m. and lasted approximately 15 minutes.

NFA.

Supervisory Officer: _____ I.D.: _____

Reporting Officer: _____ I.D.: 0670
SGT PATRICK J GRADY

jmn:dictated 11/23/03

[PAGE 3]

Madison Police Department PL1020D
5/25/04 Incident Maintenance Inquiry
ORI #: WI01301 MAPD 2003-00106076

Call Date/Time . : 10/11/2003 8:29:00
Dispatch Date/Time : 10/11/2003 8:30:26
Arrive Date/Time :
Clear Date/Time . : 10/11/2003 8:43:17 Disposition: REPORT

Location . . : 300 W. BELTLINE HY Type: O
Cross Street : Venue: MA MADISON
Nature Of Call: CKING PEOPLE WITH SIGNS ON OVERPASS HERE 082
Caller . . . : PER 1221, , ,
Complainant . : , , ,
Incident Type : 38 P DISTRUBANC Phone Number:
Report Reqd . : YES Priority . : 4
Unit 1 # . . : 1221 ID # 1: GRADY, PATRICK, J,
ID # 2 : ARMSTRONG, BRADLEY
Unit 2 # . . : 1C3 ID # 3: MOROVIC, JAMES, A,
ID # 4:

Area: 300 SOUTH Section: 309 309 Grid :

F3=Exit F7=Prior F8=Next F9=Cases
F11=State/NCIC History F12=Cancel
F14=Status/Dispos F15=Suspect Vehicles
F16=Names F17=Times F18=Radio Log
F19=Dispatch F20=Plates F21=Review Process
F23=Case Documents F24=Documents

[PAGE 4]

New World Systems Corporation AU2300S1
05/25/04 Work With Documents
Year: 2003 Incident: 00123862
T Free Form Document AU2346S1
More: + -

CKING PEOPLE WITH SIGNS ON OVERPASS HERE
0829,004
CITY OFFICERS MEETING A THE TRAILOR PARK.
0830,005

O
5
—
F F3+Exis F12=Cancel

APPENDIX M

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RALPH OVADAL,

Plaintiff,

v.

Case No. 04 C 0322 S

CITY OF MADISON, WISCONSIN;

RICHARD WILLIAMS, in his official capacity as Chief of Police, for City of Madison, Wisconsin;

CHRIS PAULSON, individually and in his official capacity as Sergeant for the City of Madison Police Department; and

PATRICK GRADY, individually and in his official capacity as police officer for the City of Madison Police Department

Defendants.

AFFIDAVIT OF GREG OVADAL

STATE OF WISCONSIN
COUNTY OF MILWAUKEE

I, Greg Ovadal, hereby swear and depose as follows:

1. My name is Greg Ovadal and I am competent to testify to the facts stated herein. I make this affidavit based upon my personal knowledge.

2. I am a citizen of the United States and a resident of Milwaukee County, Wisconsin.

3. On September 3, 2005 I was driving down the Beltline highway in the City of Madison, Wisconsin.

4. While passing under a pedestrian overpass spanning the Beltline highway, I saw an individual holding signs against the fence so that drivers could read a message. He was protesting the war against Iraq.

5. I took two photographs of this individual and his signs.

6. I did not see the police asking this individual to leave the overpass.

7. I did not see this individual interfering with anyone on the overpass or the Beltline highway below.

8. I have viewed the photographs I took on September 3, 2005, and can verify that the photographs are accurate representations of my observations of the Beltline overpass on that day. True and correct copies of these photographs are submitted herewith.

GREG OVADAL

Affiant further sayeth not.

STATE OF WISCONSIN
COUNTY OF DANE

On this _____ day of October, 2005, before me, a Notary Public of the State and County aforesaid, personally appeared Greg Ovadal, to me known (or proved to me on the basis of satisfactory evidence), and who, upon oath, acknowledged that he executed the foregoing instrument for the purpose therein contained.

Notary Public

My Commission Expires:

_____

54

(2)

No. 06-1318

FILED
MAY 0 2 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

RALPH OVADAL,

Petitioner,

v.

CITY OF MADISON, WISCONSIN, RICHARD WILLIAMS, CHRIS PAULSON and PATRICK GRADY

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Seventh Circuit

BRIEF IN OPPOSITION

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Counsel of Record
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P.O. Box 927
Madison, WI 53701-0927
(608) 257-9521
Counsel for Respondents

QUESTIONS RESTATED

1. Should the Supreme Court grant review even though no circuit court split exists as to the application of the independent judgment rule in First Amendment cases and even though the Seventh Circuit applied the correct standard of review to the specific facts germane to the case before it?

2. Is a municipality without any ability to regulate on a content-neutral basis a demonstration that creates a dangerous traffic hazard for those traveling on a high-speed freeway?

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STATEMENT OF THE CASE

Petitioner Ralph Ovadal is a pastor who, on numerous occasions, has exercised his First Amendment rights to express his viewpoints on religious and political issues. App. 59a-60a. He often engages in expressive activity with a number of his followers. App. 60a. In the last five years, he and his group engaged in expressive activities at some 33 different events and locations in and around the City of Madison, Wisconsin. App. 109a-110a. The target audience for his message is "the whole world." App. 61a.

During 2002 and the first eight months of 2003, Ovadal and his group expressed their religious viewpoints on homosexuality at least six times on Beltline overpasses. App. 53a, 100a. The Beltline is Madison's restricted access freeway where the average traffic speed exceeds 60 miles per hour. App. 2a. The overpasses are pedestrian walkways spanning the freeway. On those six occasions, Ovadal observed no traffic problem developing as a result of his group's activity and he and his group were not ordered to disperse. App. 100a-101a.

On Tuesday, September 2, 2003, the day after Labor Day, Ovadal and nine other individuals set up a demonstration with signs and banners on a Beltline overpass during rush hour traffic. App. 81a. The particular Beltline overpass the group selected was between the exits for Seminole Highway and Verona Road. App. 79a. The Beltline in this area is a fast moving, heavily traveled road with three lanes of traffic in each direction. App. 53a-54a. This is a notorious stretch of the Beltline for on and off traffic, with a through lane turning into an exit lane unexpectedly. App. 154a. That day, Ovadal and his group displayed two bright yellow banners, each 16 feet long by 2 3/4 feet wide, with large black lettering stating,

"Homosexuality Is Sin." App. 53a. The group had two or three additional signs, plus a large American flag. App. 82a.

Don Johnson, an off-duty deputy sheriff for Jefferson County, Wisconsin, happened to be driving on the Beltline approaching the area where Ovadal and his group were located that day. App. 144a-145a. Way ahead of him, he saw vehicles slowing down and some even slamming on their brakes and weaving out of their travel lane. App. 145a-146a. Johnson himself almost hit the vehicle in front of him. App. 145a. When he looked up briefly, he saw people holding a bright banner and yelling and waving their arms. App. 146a-148a. Johnson concluded it was a dangerous situation and that somebody was likely to get hurt. App. 148a. He called 911 to report his concerns. App. 147a. Based on what Johnson saw on the Beltline that day, the spectacle of the people with the banners and signs on the overpass was adversely affecting traffic. App. 148a. Johnson did not care what was written on the banner, but did care about a situation developing in which somebody might get hurt. App. 149a.

Madison police officer Curtis Fields also happened to be driving on the Beltline. App. 152a. Several times in traffic, he had to apply his own brakes and, at one point, had to stop his vehicle completely as traffic in his lane was not moving. App. 153a. Officer Fields tried to figure out what was causing the traffic problems; he suspected a traffic accident but did not see one. App. 153a. Then, he noted a group of about ten people on the overpass above the traffic with signs and banners. App. 154a. He saw some of the people in this group shouting down to vehicles traveling on the Beltline below. App. 296a. When Officer Fields reported his observations to police dispatch, he was told that others had already called with concerns about near crashes in the area of the Beltline where the protest was taking place. App. 154a-155a. Officer Fields was then dispatched to

the scene, where he spoke to Ovadal, the leader of the group. App. 155a-156a.

Officer Fields asked Ovadal to move his protest to a less hazardous place off the Beltline. App. 87a. He asked for cooperation in the interests of the greater good of protecting public safety. App. 88a. When Ovadal declined to relocate the protest voluntarily, Officer Fields contacted his supervisor, Sgt. Chris Paulson, to get direction on what he should do. App. 67a-69a, 156a. Initially, Sgt. Paulson instructed Officer Fields to let the demonstration continue so long as the walkway remained open to other pedestrians. App. 157a. Officer Fields conveyed that information to Ovadal and then he and his two backup officers left the overpass. App. 157a.

En route to the police district, Officer Fields received a call to return to the overpass because dispatch was receiving an increased number of calls stating that people had nearly gotten into collisions on the Beltline. App. 157a-158a. When Officer Fields arrived back at the overpass, he again appealed to Ovadal's concern for the greater good and asked his group to depart voluntarily. App. 158a. He told Ovadal about more reports of near crashes and, in response, Ovadal said near crashes happen all the time on the Beltline. App. 92a. When Ovadal again refused to leave the overpass, Officer Fields conveyed that information to Sgt. Paulson, who said that he was going to call the district attorney's office to get legal advice on what to do. App. 158a.

Sgt. Paulson communicated with Dane County Deputy District Attorney Judy Schwaemle, a 20-year veteran of the DA's office. App. 175a-176a. Sgt. Paulson questioned her about what officers could do regarding a demonstration on a Beltline overpass. The sergeant's specific concern was whether, given the demonstrators' right to protest, law

enforcement could do anything about reports that had been received regarding motorist safety. App. 176a. In response to that inquiry, Schwaemle advised Sgt. Paulson that, if genuine traffic hazards were observed, police officers could ask the demonstrators to relocate. App. 176a. She knew Sgt. Paulson intended to rely on her legal input in determining how to handle the situation. App. 177a. By the time he contacted Schwaemle, Sgt. Paulson had already been informed by dispatch of about 12 more calls reporting traffic disruption and near collisions on the Beltline in the area of the protest. App. 182a.

After receiving Schwaemle's advice, Sgt. Paulson instructed Officer Fields to order Ovadal and his group off the overpass. App. 183a-184a. Originally, Sgt. Paulson wanted to get to the site himself to directly convey the order to disperse. Traffic was so congested, however, that he had difficulty reaching the scene. App. 184a. Therefore, it fell to Officer Fields to issue the order. If the group refused to disperse, Officer Fields told them they would be cited for disorderly conduct. App. 159a. He explained to Ovadal that his group could stay on the overpass if they would put down their signs and discontinue creating the spectacle. App. 97a, 160a.

Officer Fields noticed Beltline motorists who were visibly angry as they traveled on the Beltline near the area of the protest. While he could see they were angry, he could not know whether their anger resulted from disagreement with Ovadal's message or from disgust over the traffic snarl in which they had gotten caught. App. 171a. Ovadal recalls Officer Fields saying that people were upset and mentioning a disturbance, but he does not know whether Officer Fields tied those comments to Ovadal's message or to the traffic snarl in general. App. 111a-112a.

Sgt. Paulson arrived at the scene after Ovadal and his group had already departed the overpass, but had not yet left the area. App. 162a. Ovadal peppered Sgt. Paulson with questions and Sgt. Paulson attempted to respond in a way that would end the episode and allow him and his officers to address other police business. App. 99a. Sgt. Paulson repeatedly assured Ovadal that his order that evening was not content based. App. 98a. He told Ovadal that his order would have been no different if demonstrators with great big Green Bay Packer signs were creating the same traffic hazard. App. 98a.

Sgt. Paulson declined to respond to Ovadal's question about whether he could be on the overpass at 2:00 a.m. or 3:00 a.m., a question Ovadal characterized as "hyberbole." App. 100a, 185a. Sgt. Paulson was exercising incident authority, but not policymaking authority, when he spoke to Ovadal that evening. App. 186a. Sgt. Paulson's lack of policymaking authority is something Ovadal fully understood. App. 99a. Ovadal knew that Sgt. Paulson was not the City's final policymaker on the issue of expressive activities on Beltline overpasses. App. 99a.

In response to the safety hazard, Sgt. Paulson did not consider allowing the demonstrators to maintain their position on the overpass with their signs and banners, but then sending police officers down on the Beltline to direct traffic. App. 188a. He did not consider that alternative because it was not a prudent or safe alternative. App. 188a. Directing traffic on the Beltline would have created a greater hazard. App. 222a.

On Saturday, October 11, 2003, at about 8:30 a.m., Ovadal and a group that this time numbered about 14 again chose a Beltline overpass, this one near the Park Street exit, as the site at which to display large banners and signs expressing religious and political viewpoints. App. 105a-106a. This overpass also spans six lanes of Beltline traffic. App. 53a-54a.

Sgt. Patrick Grady was traveling on the Beltline near the Park Street overpass that morning. App. 205a-206a. He saw vehicles slowing up by about 15 to 20 mph as he approached the area of the overpass. App. 206a. He looked around to determine what was causing the traffic slow down and saw a group of people on the overpass displaying banners and signs to the motorists below. App. 206a. Sgt. Grady concluded the display was creating a hazard to both eastbound and westbound traffic on the Beltline. App. 208a. He did not see anyone responding angrily to the message on display, but he did see cars slowing abruptly to look at the display. App. 209a. If he had not seen the traffic slow down and recognized the traffic hazard himself, Sgt. Grady would have simply driven by without stopping. App. 210a.

Sgt. Grady felt obliged to deal with the traffic hazard. App. 210a. He explained to Ovadal that the Beltline was a special situation because many drivers were going 60 to 70 mph and distractions to their driving created an unacceptable safety risk. App. 214a-215a.

Sgt. Grady did not tell Ovadal's group to disband. Rather, he asked the group to move their protest elsewhere. App. 209a. His response had nothing to do with Ovadal's message. Instead, it had everything to do with the fact that the display of signs and banners was causing people to slow down significantly and creating a traffic hazard. App. 209a-211a. Ovadal and his group complied with Sgt. Grady's request to leave the overpass on October 11, 2003; no citations were issued and no arrests were made. App. 54a.

On Saturday, November 8, 2003, during the late morning, Ovadal again engaged in expressive activity on a Beltline overpass, this one closer to the City of Monona. App. 108a-109a. It was a smaller group this time and they were on the

overpass from about 10:30 to 11:30 a.m. App. 109a. Ovadal observed no traffic problems resulting from the expressive activity that day. App. 109a. The overpass was under the City's jurisdiction and a Madison police sergeant interacted with the group there. App. 109a. The officer told them that complaints about the group's message would not be reason to halt the expressive activity. App. 115-116a, 141a-142a. Because there was no traffic hazard that morning, the police officer saw no reason to halt the demonstration and told Ovadal and his group they were "good to go." App. 116a.

On May 25, 2004, Ovadal filed his lawsuit in the United States District Court for the Western District of Wisconsin, alleging that the City, its former police chief, and Sgts. Grady and Paulson had violated his First Amendment rights by ordering him and his fellow demonstrators to move their expressive activities from the Beltline overpasses on September 2 and October 11, 2003 after traffic hazards had developed. In September 2004, both sides moved for summary judgment. The Court granted defendants' motion and denied Ovadal's motion, App. 37a-48a, and he appealed to the Seventh Circuit.

In a decision dated July 19, 2005, the Seventh Circuit reversed the summary judgment and remanded the case for further proceedings. *Ovadal v. City of Madison*, 416 F.3d 531 (7th Cir. 2005); App. 20a-30a. In its 2005 opinion, the Seventh Circuit noted that the key question that required further factual development was whether the City's rule that no protest may take place on Beltline overpasses when those protests cause a traffic hazard is capable of content-neutral application or whether the City had imposed a content-based and impermissible "no-Ovadal-on-overpasses" rule. App. 29a-30a. In the process of identifying that key question, the Seventh Circuit stated that a policy prohibiting not just Ovadal's but all protests and all signs on all Beltline overpasses could certainly

be a constitutional place and manner restriction on speech because it would be clearly content-neutral. App. 28a.

After remand, the district court entered a new scheduling order, setting the matter for trial in December 2005. Ovadal moved for a bench trial and that motion was granted. The bench trial took place on December 12, 2005. App. 51a. At trial, Ovadal called two witnesses and the City called six. Other evidence was admitted by stipulation. App. 7a. Notably, Ovadal called no witness to testify that he or she caused a traffic hazard on the Beltline in reaction to Ovadal's message. On the other hand, two of the witnesses called by the City, Don Johnson and Officer Fields, testified that they personally observed and were caught up in the traffic hazard without caring one way or another about the content of the demonstrators' message. App. 149a, 153a-155a.

At the completion of the evidence and the closing arguments, the district court issued its decision, dismissing Ovadal's claims. App. 246a. The next day, the district court issued a memorandum and order to amplify its oral decision from the bench. App. 11a. The district court made findings of facts and conclusions of law expressly addressing the questions highlighted by the Seventh Circuit in its remand order. App. 11a-13a. The district court held that Ovadal was not banned from the overpass on the two occasions in question because of the content of his message or the response of drivers to his message. Instead, the district court held, Ovadal was asked to leave the overpass on those two occasions because the spectacle of signs and banners on the overpass caused an observable traffic hazard. App. 12a. The Court concluded that any ban was content-neutral because it was based solely on whether a traffic hazard occurred. App. 13a. Further, the Court held that the City's response was necessary to serve the compelling governmental interest in assuring the safety of Beltline

motorists and narrowly drawn to achieve that purpose by restricting expressive activity only when an observable traffic hazard developed. *Id.* Finally, the district court determined that Ovadal had ample alternative avenues to engage in expressive activities in and around the City of Madison. *Id.*

From the judgment against him, Ovadal again appealed to the Seventh Circuit. This time, the Seventh Circuit affirmed in a decision issued on November 20, 2006. App. 1a-10a. The Court held as follows:

> The evidence at trial does not support any allegation that there was a general unwritten policy that placed content-based prohibitions on Ovadal's speech. The record indicates that Ovadal was not chilled or deterred from exercising his First Amendment rights.

App. 10a. The Seventh Circuit found "particularly telling" that Ovadal was again exercising his First Amendment rights on a Beltline overpass after the two occasions about which he complained in this lawsuit. App. 9a. The Court found that "the facts . . . do not support the allegation that there was ever any absolute ban on Ovadal protesting from bridges" in Madison. App. 9a.

Until November 29, 2005, the City of Madison did not have an express written policy banning all display of signs and banners on Beltline overpasses. App. 218a. On November 29, 2005, the City instituted such a policy by passing Ordinance 05-00193. App. 58a. The new ordinance prohibits hand carried or permanent signs on bridges or overpasses over expressways like the Beltline, other than official traffic control signs. App. 3a-4a. The ordinance was first effective a few days after the bench trial in December 2005. App. 3a. Adoption of the

ordinance was in direct response to the advice contained in the 2005 opinion of the Seventh Circuit, stating that a ban on all signs and banners displayed on Beltline overpasses would clearly be content-neutral. Thus, the City adopted the ordinance to establish a clear policy beyond challenge and to avoid future litigation of cases like this one.

Until the new ordinance's enactment, the mere presence of a sign, a group of signs, or a protest on a Beltline overpass was insufficient to warrant removal by the police. App. 220a-221a. If there was no significant impact on traffic safety, there was no City policy dictating removal. App. 220a-221a. Therefore, a "Go Team" sign, an anti-war sign, a pro-war sign, political candidate signs, or Ovadal's signs would not have been removed absent the added element of a significant impact on traffic safety. App. 224a.

In concluding that the police reaction to Ovadal's demonstrations on the two occasions in question was content-neutral, the Seventh Circuit found it noteworthy that Ovadal and his followers had demonstrated on Beltline overpasses with signs at least six times before the dates in question and once after the date in question without any police restrictions on their activities. App. 9a. Thus, the Seventh Circuit concluded there was no unwritten and widespread policy that effectively prevented Ovadal from engaging in protected speech. App. 8a. Because the Court found no constitutional violation, it never reached the questions of qualified immunity and municipal liability, issues which respondents raised as alternative grounds to affirm the judgment.

REASONS FOR DENYING THE PETITION

There are three primary reasons to deny the petition. First, Supreme Court precedent on the standard of review in First

Amendment speech cases is well-settled, a proposition with which petitioner agrees. Pet. Br. at 12. Petitioner claims there is a circuit split as to the application of specific facts to this established rule of law. However, as Supreme Court Rule 10 teaches, even if petitioner's analysis were correct (which it is not), the Court should deny certiorari review that would center on only allegedly erroneous factual findings or misapplication of a properly stated rule of law. In short, this petition simply plows old ground.

Second, petitioner's description of a circuit split is inaccurate. He contends that the First, Second and Seventh Circuits review *all* factual findings in First Amendment cases using a clearly erroneous standard, while the Third, Eighth and Ninth Circuits review *all* factual findings (other than credibility facts) using a *de novo* standard. Petitioner is incorrect. His characterization of the law is overly simplistic and fails to appreciate that not all facts are entitled to the same level of review under First Amendment law. Typically, a First Amendment case involves two types of facts: (1) non-constitutional facts, which a court reviews for clear error; and (2) constitutional facts, which a court reviews *de novo*. Although appellate courts use different words to describe non-constitutional facts (such as "predicate," "historical" and "non-crucial" facts), they generally apply the same standard of review depending on the specific facts at issue.

Third, the Seventh Circuit opinion at issue conforms with this Court's precedent recognizing the ability of a municipality to regulate the time, place and manner of protected speech if the restriction is content-neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative channels for communication of the speaker's message. This standard, enunciated in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and further explained in *Hill v.*

Colorado, 530 U.S. 703 (2000), was applied properly in this case, making further review wholly unwarranted.

I. SUPREME COURT PRECEDENT ON THE STANDARD OF REVIEW IN FIRST AMENDMENT CASES IS WELL-SETTLED.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), a defamation case, the Supreme Court noted that it does not merely explain constitutional principles; it also tries to make certain those principles are constitutionally applied. To do that, the Court examines for itself the allegedly defamatory statements at issue and the circumstances under which they were made to see whether the statements are of the character that the First Amendment protects. *Id.*

The Court's role as independent examiner in First Amendment cases was considered again, two decades later, in another defamation case, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). In *Bose*, the Supreme Court confronted an apparent conflict between Fed. R. Civ. P. 52(a), which provides that findings of fact shall not be set aside unless clearly erroneous, and the rule in First Amendment cases that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose*, 466 U.S. at 498-99, quoting *New York Times*, 376 U.S. at 284 and 286.

Bose explains that an appellate court's independent review of the record in a defamation case is necessary to determine whether the speech in question falls within a category of unprotected speech and also to insure that protected expression is not unduly inhibited. 466 U.S. at 505. To apply its independent judgment to the speech in question, the Court must

review findings of fact where such facts are so intermingled with a conclusion of law as to make an analysis of the facts necessary in order to pass upon the federal question. *Id.* at 509 n.27. Nevertheless, *Bose* clearly staked out the limits of an appellate court's independent assessment of the facts, writing as follows:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not actually necessary to review the "entire" record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff.

Bose, 466 U.S. at 514 n.31.

Five years after *Bose*, the Court revisited the issue in *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657 (1989), a libel action against a newspaper. In *Harte-Hanks*, the Court held that credibility determinations are reviewed under a clearly erroneous standard because the fact-finder has had the opportunity to observe the witness, even though "the reviewing court must 'examine for [itself] the statements in issue and the circumstance under which they were made to see . . . whether they are of a character which the principles of the First

Amendment . . . protect." *Id.* at 688 (brackets and ellipses in original), quoting *New York Times*, 376 U.S. at 285. As part of its review of the entire record, the Court in *Harte-Hanks* gleaned from the jury verdict what facts the jury "must" have rejected and, based on those findings of fact, concluded that the newspaper acted with actual malice. 491 U.S. at 690-91. In short, the Court relied on jury findings as a predicate for its own independent assessment of the actual malice question.

Six years later, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 567 (1995), a First Amendment case involving a parade permit under public accommodations law, the Court reiterated the confines of the independent judgment rule, noting that a reviewing court is "obliged to make a fresh examination of crucial facts" to determine whether First Amendment rights have been violated, but to do so without limiting its deference to the trial court on matters of witness credibility. For those propositions, *Hurley* cited the standards already established in *New York Times*, *Bose* and *Harte-Hanks*. *Id.* at 567-68. Thus, the rule of law petitioner wants reviewed in this case is one this Court has already addressed and settled in an unbroken string of opinions that need not be revisited.

II. THE CIRCUIT COURTS ARE IN AGREEMENT ON THE APPROPRIATE STANDARD OF REVIEW FOR FIRST AMENDMENT CASES.

A. The First, Second and Seventh Circuits Understand and Apply the Standard of Review Articulated in *Bose*.

Petitioner contends that the First, Second and Seventh Circuits review "all factual findings" in First Amendment cases under a clearly erroneous standard. *See* Pet. Br. at 18, citing *Locurto v. Giuliani*, 447 F.3d 159 (2d Cir. 2006), *Gustafson v.*

Jones, 290 F.3d 895 (7th Cir. 2002), and *Duffy v. Sarault*, 892 F.2d 139 (1st Cir. 1989). This is incorrect. These circuit courts (as do the other circuit courts) draw a distinction between the types of facts at issue in a First Amendment case, namely, non-constitutional facts, which are reviewed for clear error, and constitutional facts, which are reviewed *de novo*.

Petitioner first cites a Second Circuit case involving government employee speech and contends that Judge Calabresi, in an unanimous opinion, applied the wrong standard of review. Pet. Br. at 18, citing *Locurto*, 447 F.3d at 177 n.6. However, petitioner's citation is incomplete and misleading. In support of its contention that the Second Circuit applies a clearly erroneous standard to all factual findings in First Amendment cases, petitioner quotes this fragment from a footnote in *Locurto*: "defendants' intent is a factual question, which we review for clear error . . . ." The full quote tells a different story, however, providing as follows:

> although the defendants' intent is a factual question, which we review for clear error, whether that intent ultimately amounts to "retaliation" forbidden by the Constitution is a question of law, which we review *de novo*.

Locurto, 447 F.3d at 177, n.6. As the full quote illustrates, the Second Circuit applies a clearly erroneous standard to the non-constitutional facts relevant to a defendant's intent and a *de novo* standard to constitutional facts, such as whether that intent actually amounts to a violation of the Constitution. That standard of review comports squarely with Supreme Court precedent.

Likewise, petitioner cites *Gustafson*, 290 F.3d at 906, a government employee speech case, for the proposition that the

Seventh Circuit reviews "all factual findings" in First Amendment cases for clear error. This too is incorrect. The Seventh Circuit held in *Gustafson* that:

> Whether a government employee's speech is protected by the First Amendment is a question of law that the district court properly withheld from the jury, even though it may have required predicate factual determinations. Although our review of the court's legal conclusions is *de novo*, we review the record as a whole, and we will accept the district court's conclusions of *historical fact* unless they are clearly erroneous.

Gustafson, 290 F.3d at 906 (emphasis added and citations omitted). Thus, the Seventh Circuit clearly distinguishes non-constitutional facts ("predicate" or "historical" facts) from constitutional facts.

Even if one could find ambiguity in the standard articulated in *Gustafson*, the Seventh Circuit has demonstrated its adherence to the Supreme Court's independent judgment rule in First Amendment cases on many occasions. In *United States v. Israel*, 317 F.3d 768, 770 (7th Cir. 2003), for example, the Seventh Circuit made the following observation:

> Where First Amendment concerns are at issue, appellate courts must conduct an "independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."

Id., quoting *Bose*, 466 U.S. at 499. Likewise, in *A Woman's Choice - East Side Women's Clinic v. Newman*, 305 F.3d 684,

689 (7th Cir. 2002), *cert. denied*, 537 U.S. 1192 (2003), the Seventh Circuit demonstrated its clear understanding of the review standard articulated in *Bose*, writing as follows:

> That admixture of fact and law, sometimes called an issue of "constitutional fact," is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects. Only the findings of historical fact are sheltered by Rule 52(a). Thus our consideration of the studies' *significance* is not deferential.

(emphasis in original).

Petitioner fares no better in asserting that the First Circuit misunderstands the review standard. For that proposition, petitioner cites *Duffy*, 892 F.2d at 145, a speech termination case decided by the First Circuit in 1989. The precise question *Duffy* addressed was whether *Bose* required *de novo* review of a finding that the defendant's termination would have occurred regardless of the plaintiff's protected conduct or whether a clearly erroneous standard applied to that determination. *Id.* at 143. After a lengthy recitation of the law concerning the standard of review in First Amendment cases, the First Circuit held that findings on what is protected free speech are reviewed *de novo* because these findings of fact "directly touch First Amendment rights." *Id.* at 145. Thus, the First Circuit clearly understood that it was required by *Bose* to undertake an independent review of the district court's ultimate finding that the defendant's statements to the press were protected under the First Amendment. *Id.* at 143. That being said, the court still applied a clearly erroneous standard to factual questions about whether speech substantially affected the defendant's employment decision and whether the defendant met his burden

of proof. As to those predicate questions, the First Circuit observed that they were "factual determinations subject to the clearly erroneous standard." *Id.* at 145. In making that distinction, the First Circuit did not misunderstand the independent judgment rule set forth in *Bose*.

As the case law reveals, the First, Second and Seventh Circuits do not apply a clearly erroneous standard to "all factual findings" in First Amendment cases. Accordingly, no circuit split exists and no review is necessary.

B. The Third, Eighth and Ninth Circuits Also Understand and Apply the *Bose* Standard of Review in First Amendment Cases.

Petitioner contends next that, in contrast to the First, Second and Seventh Circuits, the Third, Eighth and Ninth Circuits apply a *de novo* standard to all factual issues other than credibility facts. Pet. Br. at 15. However, as the discussion below reveals, all six circuits apply the same independent judgment standard of review articulated by this Court.

As to the Third Circuit, petitioner contends that it applies a *de novo* standard to all facts in a First Amendment case, citing *Fabulous Associates, Inc. v. Pennsylvania Public Utility Comm.*, 896 F.2d 780, 783 (3d Cir. 1990), a case involving sexually explicit telephone messages. Pet. Br. at 15. But that is not quite what the case says. To the contrary, the Third Circuit held explicitly that "in the area of *constitutional* fact, we are not required to defer to factual inferences reached by the district court." *Id.* at 783 (emphasis added). In another more recent case, the Third Circuit again used the phrase "constitutional fact" to identify those issues that required independent appellate review. *Mitchell v. Horn*, 318 F.3d 523,

531 (3d Cir. 2003). Thus, the Third Circuit did not extend its *de novo* review to all facts, rather only to constitutional facts.

Moreover, the Third Circuit even applied a clearly erroneous standard in *Fabulous Associates*, the very case petitioner cites for the opposite proposition. Specifically, the court noted that the commonwealth of Pennsylvania never asserted that the speech at issue was obscene. 896 F.2d at 783. Therefore, no constitutional fact was raised. Because no constitutional fact was at issue, the appellate court and "the parties agree that [the] scope of review of the district court's findings of fact is under the clearly erroneous test." *Id.* Thus, *Fabulous Associates* illustrates that the Third Circuit applies a *de novo* review to constitutional facts and a clearly erroneous standard to non-constitutional facts.

The same is true for the Eighth Circuit. Petitioner cites *FAIR v. Nebraska Dept. of Social Services*, 111 F.3d 1408, 1411 (8th Cir. 1997), a speech case, for the proposition that the Eighth Circuit does not apply a clearly erroneous standard in First Amendment cases. Pet. Br. at 16. However, the Eighth Circuit has not painted with such a broad brush. To the contrary, the Eighth Circuit held in *FAIR* that it "review[s] findings of *noncritical* facts for clear error," but "independently review[s] the evidentiary basis of *critical* facts, giving due regard to the trial court's opportunity to observe the demeanor of witnesses." *FAIR*, 111 F.3d at 1411 (emphasis added); *see also Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 355-59 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) (discussing in detail whether a particular fact is a constitutional fact requiring application of the independent judgment rule). As the holdings in *FAIR* and *Lundell* demonstrate, the Eighth Circuit distinguishes between critical and non-critical facts in determining the appropriate standard of review in First Amendment cases.

The Ninth Circuit also understands the nuanced standard of review articulated in *Bose*. Petitioner is simply wrong to contend that the Ninth Circuit applies a *de novo* standard to all factual findings in First Amendment cases, with the exception of credibility assessments. *See* Pet. Br. at 12, citing *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). In its careful review of the applicable standard, *Newton* recognized that the Supreme Court had fashioned a process for reviewing evidence which "permits judicial protection of First Amendment values while still paying due deference to the fact-finding role of juries . . . ." *Id.* at 672. Thus, the Ninth Circuit understood that the rule of independent review allowed the appellate court to accept all the purely factual findings of the district court, but nevertheless to decide for itself whether the record as a whole demonstrated the existence of actual malice. *Id.* at 670.

The Ninth Circuit further explained its understanding of the standard of review in *Planned Parenthood v. American Coalition of Life*, 290 F.3d 1058 (9th Cir. 2002), *cert. denied*, 539 U.S. 958 (2003), a threat of force case under the First Amendment. After an exhaustive analysis of both Supreme Court and Ninth Circuit law on the standard of review in First Amendment cases, the Court held as follows:

> We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact — a true threat — falls within the

> unprotected category and is narrowly enough bounded as a matter of constitutional law.

Id. at 1070. This consistent approach is layered, but not unclear.

As the case law demonstrates, the Third, Eighth and Ninth Circuits, just like the the First, Second and Seventh Circuits, review non-constitutional facts for clear error and constitutional facts *de novo*. The appellate courts are not in disarray over the independent judgment doctrine.

C. The Seventh Circuit Applied the Proper Standard of Review in This Case.

As explained earlier, the Seventh Circuit has correctly articulated and applied the independent judgment rule in many First Amendment cases. *See Gustafson*, 290 F.3d at 906; *Israel*, 317 F.3d at 770; and *Newman*, 305 F.3d at 689. In this case, the Seventh Circuit did not spend much time explaining the intricacies of the standard of review, but nonetheless it applied the correct standard. *Ovadal v. City of Madison*, 469 F.3d 625, 630 (7th Cir. 2006) (*Ovadal II*). Moreover, even if the Seventh Circuit had failed to apply the correct standard, the case would not warrant certiorari review because, as Supreme Court Rule 10 explains, review is not granted to address allegedly erroneous factual findings or misapplication of a properly stated rule of law.

In the case at hand, the Seventh Circuit applied a clearly erroneous standard of review to the determination of driver intent, a non-constitutional fact, and a *de novo* standard to whether that intent demonstrated a violation of the First Amendment, a constitutional fact. *Ovadal II*, 469 F.3d at 630. As to the constitutional fact, the Court held that, if the findings

of fact supported the view that drivers on the Beltline created a traffic hazard in angry response to petitioner's message, then the police must permit the speech and control the crowd because there is no heckler's veto. *Id.* This application of the review standard comports with Supreme Court precedent as well as the law articulated in other circuits. In fact, the Seventh Circuit reached the same conclusion the Second Circuit had reached in *Locurto* on the issue of appellate review of intent findings. *Locurto* held that intent is a non-constitutional fact reviewed for clear error, but whether that intent ultimately amounts to a constitutional violation is a constitutional fact reviewed *de novo*. *Locurto*, 447 F.3d at 159 n.6.

Petitioner concedes, as he must, that credibility determinations are reviewed for clear error in First Amendment cases. Pet. Br. at 18. As explained in *Harte-Hanks*, 491 U.S. at 688:

> credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witness."

Id., quoting *Bose*, 466 U.S. at 499-500.

Gleaning intent on the basis of conflicting testimony is the epitome of a credibility determination. The Seventh Circuit understood this. It noted that the trier of fact plays a particularly significant role as the arbiter of credibility in weighing direct and circumstantial evidence. *Ovadal II*, 469 F.3d at 630. Deferring to the district court's credibility determinations on the issue of driver intent was, therefore, wholly proper.

The Seventh Circuit is not alone in recognizing intent as a fact-bound issue dependent on credibility determinations. This Court in *Crawford-El v. Britton*, 523 U.S. 574, 589 (1998), characterized intent as "a pure issue of fact." Likewise, *Agfa Corp. v. Creo Products, Inc.*, 451 F.3d 1366, 1383 (Fed. Cir. 2006), observed that "findings of deceptive intent often require findings of credibility" and that "[c]redibility is unequivocally the province of the jury." *See also United States v. Nelson*, 450 F.3d 1201, 1209 (10th Cir. 2006), *cert. denied*, 127 S.Ct. 326 (2006), a case "[a]ffording deference to the district court's credibility findings which are central to the question of discriminatory intent."

In sum, no conflict exists among the circuit courts and, moreover, the Seventh Circuit applied the correct standard of review in this case. Accordingly, the petition should be denied.

III. THERE IS NO NEED TO REVIEW THE SEVENTH CIRCUIT'S UNREMARKABLE CONCLUSION THAT A CITY MAY CONSTITUTIONALLY IMPOSE A CONTENT-NEUTRAL REGULATION ON EXPRESSIVE ACTIVITIES THAT CREATE SIGNIFICANT TRAFFIC HAZARDS.

Petitioner attempts to characterize this case as nothing more than the City impermissibly applying a heckler's veto to a run-of-the-mill demonstration. The facts paint a much different picture. Notably, petitioner fails to disclose the significant and undisputed fact that he had protested with signs on Beltline overpasses concerning his beliefs on homosexuality on at least six other occasions before and one occasion after the two dates in question and had interacted with police on several of those occasions without any restrictions on his activities. *Ovadal II*, 469 F.3d at 631; *see also* App. 53a, 100a. Because there was no observable traffic hazard on those occasions, there was no

restriction on his exercise of First Amendment rights. Based on petitioner's own experience, therefore, the City of Madison never had or enforced a content-based no-Ovadal-on-overpasses rule. App. 9a.

On two occasions in the fall of 2003, a significant traffic hazard did develop in response to the spectacle created by petitioner and his followers. During rush hour on the day after Labor Day, petitioner and nine others chose to express their views on homosexuality from a Beltline overpass. App. 81a. Petitioner and his group came equipped with two bright yellow banners, each 16 feet long by 2 3/4 feet wide, with large black lettering. App. 53a. The group had two or three additional signs, plus a large American flag. App. 82a. The Beltline overpass they chose that day is situated over a dangerous stretch of the Beltline for on and off traffic, with a through lane turning into an exit lane unexpectedly. App. 154a. One witness, Don Johnson, was traveling on the Beltline that day and saw vehicles slamming on their brakes and weaving out of their travel lane. App. 145a-146a. Johnson himself almost hit the vehicle in front of him. App. 145a. He testified he did not care what was written on petitioner's banners, but he did care about the situation developing in which someone was likely to get hurt. App. 147a, 149a. Johnson called 911, as did at least eleven other callers reporting their concern about near collisions on the Beltline near the site of the demonstration. App. 182a.

Even with a situation that unsafe, petitioner argues that the City was without power to impose any restriction on him to move his protest because doing so would be tantamount to a heckler's veto. Petitioner cites no law to support such a strident stance, much less an actual circuit court split on the issue. Indeed, petitioner's certiorari arguments on this question can be dispensed with quickly.

On the issue of a circuit split, petitioner contends that the Sixth Circuit steadfastly prohibits any regulation that turns on listener reaction. Pet. Br. at 22, citing *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992). Petitioner claims the Sixth Circuit holding in *Americans United* creates a circuit split from decisions issued by the Fifth, Seventh and Eighth Circuits. Petitioner's characterization is inaccurate. *Americans United* is an establishment clause case involving the placement of a menorah in a downtown public plaza. *Id.* 1539-40. The placement of the menorah had nothing to do with creating a traffic or safety hazard of any kind. *Id.* In fact, the Court's brief discussion of a heckler's veto was only a backdrop to its discussion of what it called an "ignoramus's veto," a phrase the Court used to characterize those individuals determined to perceive government endorsement of religion at every turn, even when no such endorsement exists. *Id.* at 1553.

Americans United cannot create a circuit split when it does not even address the same issues addressed by the Fifth, Seventh and Eighth Circuits in the cases petitioner identifies. The Fifth Circuit case, *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 326 (5th Cir. 2005), did not, as petitioner suggests, permit a heckler's veto. Instead, *Brazos* considered whether a property owner had any say in the matter if a stranger decided to plant a flag in the public right-of-way in front of the property owner's home. Allowing someone to do that, the Fifth Circuit correctly observed, would be analogous to sending a letter to the newspaper under someone else's name, something the First Amendment cannot be interpreted to condone. *Id.* at 326. Thus, *Brazos* is a far cry from a heckler's veto case.

There are many cases that do address governmental regulation of speech in the face of traffic and safety hazards

and, as one might expect, these cases do not allow for unbridled speech at any cost to the public. For example, in *MacDonald v. City of Chicago*, 243 F.3d 1021, 1025 (7th Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002), the Seventh Circuit noted that an individual has the right to demonstrate and speak freely on controversial issues, but "that right does not allow him and other participants to create chaos by disrupting traffic, impeding pedestrians, endangering themselves or other people, and otherwise causing gridlock on the busy streets and sidewalks of the city . . . ." Likewise, in *Frye v. Kansas City, Missouri Police Department*, 375 F.3d 785, 791 (8th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005), the Eighth Circuit recognized that a City police department has the ability to regulate a protest on a content-neutral basis in order to alleviate the significant traffic hazard caused by the demonstration. *See also Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005) (upholding ability to prevent anti-abortion banners from being displayed on highway overpasses because local government has a significant interest in traffic safety); *Sanctity of Human Life Network v. California Highway Patrol*, 129 Cal. Rptr. 2d 708 (Ct. App. 2003), *cert. denied*, 2003 Cal. LEXIS 6185 (2003) (upholding ability of police to discontinue anti-abortion demonstrations on freeway overpasses because of traffic hazard).

Indeed, this Court has repeatedly held that content-neutral regulations, such as those imposed on petitioner in this case, are constitutional. *See, e.g., United States v. Grace*, 461 U.S. 171, 177-78 (1983) ("We have regularly rejected the assertion that people who wish 'to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'") (internal citation omitted); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated

speech."); *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding constitutionality of statute establishing boundaries for protesting and leafleting at healthcare facility entrances because the statute in question reflected an "acceptable balance between constitutionally protected rights of law-abiding citizens and the interests of unwilling listeners.")

According to *Ward*, the controlling consideration in deciding content neutrality is the government's purpose in developing its policy. Here, the City's controlling consideration was traffic safety. Because the City's regulation of petitioner's expressive activity was justified without reference to the content of his message, it was, under *Ward*, content neutral. That is so whether or not the regulation "has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791.

Because it is well-established that municipalities may regulate expressive activities on a content-neutral basis in order to control traffic and safety hazards, the Court should deny Ovadal's petition for certiorari review.

CONCLUSION

For all the reasons discussed, the Court should deny Ralph Ovadal's petition for writ of certiorari.

Respectfully submitted,

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